(16,719.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 506.

THE ANGLO-CALIFORNIAN BANK, LIMITED, APPELLANT,

vs.

THE SECRETARY OF THE TREASURY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

a In the United States Circuit Court of Appeals for the Ninth Circuit.

THE ANGLO-CALIFORNIAN BANK, LIMITED, Appellant,
vs.
THE SECRETARY OF THE TREASURY, Petitioner, etc., Appellee. } No. 273.

In the matter of the petition of the Secretary of the Treasury for review of a decision of the board of United States general appraisers relative to certain twenty steel rails.

Transcript on Appeal.

From the circuit court of the United States for the northern district of California.

1 THE UNITED STATES OF AMERICA:

In the Circuit Court of the United States, Ninth Circuit in and for the Northern District of California.

Petition.

The petition and application of the Secretary of the Treasury for a review, under an act of Congress approved June 10, 1890, entitled "An act to simplify the laws in relation to the collection of revenues," of the questions of law and fact involved in a decision of the board of general appraisers on duty at the port of New York, State of New York, in the matter of the classification of certain (T) steel rails, merchandise imported by the Bank of California of San Francisco, California, into the port of said San Francisco, the subsequent liquidation of duties whereon was protested by the Anglo-Californian Bank, Limited, at the same place.

To the honorable the circuit court of the United States, ninth circuit in and for the northern district of California:

The petition and application of the Secretary of the Treasury respectfully shows—

That your petitioner is and at the several times hereinafter mentioned was the Secretary of the Treasury of the United States.

That the Bank of California and the Anglo-Californian Bank, Limited, hereinafter mentioned, at the several times hereinafter referred to, were and are corporations duly organized and existing, the former under and by virtue of the laws of said State of California, the latter under and by virtue of the laws of the Kingdom of Great Britain and Ireland, both engaged in the business of banking, in the city and county of San Francisco in said State, and elsewhere, which included, among other things, the importation of foreign merchandise heretofore and hereinafter mentioned into said port.

2

That on or about the second day of March, 1887, the said Bank of California imported into the United States, to wit, at the said port of San Francisco, California, from a foreign port or place, to wit, from Barrow, in the Kingdom of Great Britain and Ireland, certain merchandise invoiced as flange (T) steel rails, by the steamship or vessel known as the "Troop," which said merchandise purports to be more fully described in and by the warehouse entry thereafter made thereof at the custom-house at the said port of San Francisco, California, and numbered 1031 (the said merchandise being more fully described as the merchandise subject to entry number 1031 and protest number 3876 of the official serial numbers of said custom house, and subject to decision number — of the official serial numbers of the board of United States general appraisers on duty at New York, State of New York, and being further described and identified as flange steel rails, upon the custom-house record invoice number 2733, series of 1888, relating to said merchandise), and which said merchandise included the said rails heretofore described, and the subject of the protest heretofore and hereinafter mentioned; and such merchandise remained in general order un-
3 claimed until the 27th day of February, 1888, when warehouse entry thereof was made and bond given by the said Bank of California as such importer and consignee; and thereupon such proceedings were had that said warehouse entry was duly liquidated March 30, 1888, by the collector of said port, under the act of March 3rd, 1883, in full force and effect at said time at $17.00 per ton, and said merchandise placed in bonded warehouse; and at the expiration of one year from the date of said original importation, the said merchandise not having been removed from said warehouse, the additional duty of 10 per cent. prescribed by section 2970, U. S. R. S., also in full force and effect at said time, was charged upon the bond against said merchandise.

That thereafter and at the expiration of three years of said bonded period, said merchandise not having been removed from said warehouse, your petitioner, upon application of the Oregon Pacific Railroad Company, a corporation, for whose account said merchandise was imported, authorized a postponement of the sale of said merchandise abandoned to the United States under the provisions of section 2971, U. S. R. S., for three months, and further and similar postponements were thereafter authorized by your petitioner, the Bank of California uniting in the application of said Oregon Pacific Railroad Company therefor.

That thereafter, and during the time embraced in such postponements of sale, and on the 15th day of March, 1895, withdrawal entry for consumption of said twenty steel rails, which are part of the merchandise hereinbefore mentioned, and are the subject
4 of said protest, weighing about five tons, was made by said Anglo-Californian Bank, Limited, upon the authority of the said Bank of California, importer and consignee as aforesaid, and duty thereon was liquidated and assessed by the said collector of the said port of San Francisco, at the said sum of $17.00 per ton, and 10 per cent. additional under the said act of March 3rd, 1883,

and said section 2970, U. S. R. S., which said sum amounting to the sum of $92.20 was liquidated, ascertained, levied and collected by said collector, and the full amount thereof, together with all charges ascertained to be due upon said merchandise, was paid by said Anglo-Californian Bank, Limited, to said collector on said 15th day of March, 1895.

That within ten days after such liquidation, ascertainment, assessment and payment of said duties, to wit: on the 18th day of March, 1895, the said Anglo-Californian Bank, Limited, being dissatisfied with said exaction, ascertainment and liquidation, and the decision of your petitioner and the said collector in the premises, gave notice to the said collector in writing of such dissatisfaction, which written notice distinctly and specifically set forth the reasons for the objections of said Anglo-Californian Bank, Limited, thereto, as follows:

That the said twenty steel rails having been continued in bonded warehouse, under terms of original warehouse bond with the sanction of the petitioner, all charges, including storage, having been paid thereon, no legal abandonment to the United States has occurred; that they are consequently entitled to be withdrawn
5 from consumption, subject only to the duty prescribed in Schedule C, paragraph 117, act of August 28, 1894, *i. e.*, seven-twentieths of one cent per pound. That section 50, of act of October 1, 1890, was applicable to said rails and made inoperative thereon, paragraph 147 of said act of March 3, 1883, and subjected said rails, if withdrawn after October 6, 1890, and before August 28, 1894, to rate in duty named in paragraph 141 of said act of October 1, 1890, and that the enacting clause of said act of August 28, 1894, was intended as a substitute for section 50 of the said act of October 1, 1890; and further that section 29 of the act of June 10, 1890, and section 50 of the said act of October 1, 1890, repealed section 2970 U. S., R. S., and that the duties on said twenty steel rails shall be assessed at the rate of seven-twentieths of a cent per pound, under said paragraph 117, Schedule C, act of August 28, 1894.

That thereafter and in due and proper time, said collector transmitted all the papers and exhibits on which said entry was made, or connected therewith to the board of the United States general appraisers, then on duty at the said port of New York; and thereafter and on the 19th day of April, 1895, said board, to wit: Wilber F. Lunt, J. B. Wilkinson Jr. and Thad. S. Sharretts, made and rendered their decision in said matter in favor of and sustaining said protest and against the said liquidation, ascertainment and decision made and rendered and duty levied and exacted as aforesaid by said collector.

And your petitioner avers that, as Secretary of the Treasury as aforesaid, he is dissatisfied with the decision of said board of
6 general appraisers as to the construction of the law respecting the act of Congress under which, and the amount of duties to which said steel rails are subject upon their withdrawal entry as aforesaid.

Wherefore, your petitioner as such Secretary of the Treasury, now

applies to this honorable court for a review of the questions of law and fact involved in said decision of said board of general appraisers.

And in respect to said withdrawal entry and payment, your petitioner specifies as the reasons for his objections thereto, that the said board of general appraisers erred in finding as a conclusion of law, holding and deciding that the said rails were not dutiable, upon their withdrawal from bond at the time aforesaid, under the said act of March 3, 1883, and said section 2970, U. S. R. S., but in finding as a conclusion of law, holding and deciding that the said rails were so dutiable under the said act of August 1, 1894, and in finding, holding and deciding that the amount of such duties was properly seven-twentieths of a cent per pound of such rails, and in not finding, holding and deciding that said rails upon their withdrawal were subject to a duty of $17.00 per ton, amounting, with the ten per cent. hereinbefore referred to, to the sum of $92.20.

And your petitioner further prays this honorable court for an order that the said board of general appraisers *to* return to this court the record and evidence taken by them, together with a certified statement of the facts involved in said case, and their decision thereon; and that upon said record and evidence, and such
7 further evidence, if any, as may be taken herein, the court proceed to hear and determine the questions of law and of fact involved in said decision, respecting the liquidation and ascertainment of the rate of duty chargeable upon said merchandise upon its withdrawal from bond as aforesaid, and that upon said determination, said decision of said board of general appraisers be reversed and set aside, and that it be adjudged that the duties on said twenty steel rails, upon their withdrawal from bond as aforesaid, were properly liquidated and assessed at the sum of $17.00 per ton, under said act of March 3, 1883, and ten per cent. additional thereof, under said section 2970, U. S. R. S., 17 May, 1895.

THE SECRETARY OF THE TREASURY,
By H. S. FOOTE,
United States Attorney and Attorney for Petitioner.

SAMUEL KNIGHT,
Ass't U. S. Att'y, of Counsel.

(Endorsed:) Filed May 17, 1895. W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk.

8 THE UNITED STATES OF AMERICA:

In the Circuit Court of the United States in and for the Northern District of California, Ninth Circuit.

In the matter of the petition of the Secretary of the Treasury of the United States for review of decision of U. S. general appraisers relative to certain 20 steel rails, merchandise imported into the port of San Francisco, California, by the Bank of California, the subsequent liquidation of duties whereon was protested by the Anglo-Californian Bank, Limited.

Order of Court for Return of Record, etc.

Whereas, the Secretary of the Treasury of the United States, has applied to this court to review the questions of law and fact involved in the decision of the U. S. general appraisers on duty at the port of New York, State of New York, made and rendered by said U. S. general appraisers, on the 19th day of April A. D. 1895, liquidating and assessing the sum of seven-twentieths of a cent per pound on said merchandise, upon the withdrawal thereof from bond, which said merchandise was imported into the United States at the port of San Francisco, California, and entered at the custom-house at San Francisco, California, (the said merchandise being more fully described as being the merchandise subjected to entry number 1031 and protest number 3876 of the official serial numbers of said custom-house, and also subject to said decision number — of the official serial numbers of the U. S. general appraisers, to which
9 said numbers, reference is here made, and being further identified as flange steel rails, upon the custom-house record invoice relating to said merchandise.)

And, whereas, the said Secretary of the Treasury of the United States, has duly filed his application and petition for a review of said decision, and praying among other things, that the said U. S. general appraisers be ordered to return to this court the records and evidence taken by them in said cases, together with a certified statement of the facts involved in the case, and their decision thereon.

Now, therefore, in consideration of the premises it is hereby ordered, that the three U. S. general appraisers on duty at the port of New York, State of New York, do, with all convenient speed, return to this court the record of said matter and the evidence taken by them therein, together with a certified statement of the facts involved in the case, and their decision thereon.

And it is further ordered that this order be entered upon the minutes of this court and served upon each member of the said board of three general appraisers, by delivering to each of them a certified copy thereof.

JOSEPH McKENNA, *Judge.*

(Endorsed:) Filed and entered May 17, 1895. W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk.

Clerk's Certificate.

I, W. J. Costigan, clerk of the circuit court of the United
10 States of America, of the ninth judicial circuit, in and for the northern district of California, do hereby certify the foregoing to be a full, true and correct copy of an original order made, filed and entered on the 17th day of May, A. D. 1895, as the same appears of record in said court in the above-entitled matter.

Attest, my hand and the seal of said circuit court, this 24th day of May, A. D. 1895.

[SEAL.] W. J. COSTIGAN, *Clerk.*

Proof of Service on Appraisers.

I do hereby certify, that in obedience to an order of this court, dated the 24th of May, 1895, on the 11th day of June, 1895, at the city of New York, in my district, I personally served the within order upon the within-named board of three general appraisers, by exhibiting to Wilbur F. Lunt, Joseph B. Wilkinson and Thaddeus S. Sharretts, members of said board, the within original, and at the same time delivering to and leaving with each of them a copy thereof.

JOHN H. McCARTY,
U. S. Marshal, S. D. N. Y.

J. G. McC., New York, June 18, 1895.

(Endorsed:) Filed June 24th, 1895. W. J. Costigan, clerk.

11 In the Circuit Court of the United States for the Northern District of California.

A. W. C. J. P. Lake (Seal), chief clerk board U. S. general appraisers.

In the matter of the application of the Anglo-Californian bank for a review of the decision of the board of general appraisers as to the rate, etc., of duty of certain steel rails imported by said bank on the British ship "Troop" March 2, 1887. Suit No. 1285.

Return of the board of United States general appraisers to the order of Hon. Joseph McKenna, circuit judge, dated New York, June 13, 1895.

Return of Board of U. S. General Appraisers.

The board of United States general appraisers, sitting at New York, in response to the order of the court in the above matter, make the following return of the record and evidence taken in the above matter, and of the facts therein, as ascertained by them.

They state that a letter, hereto annexed marked Exhibit "A" was received from the collector of customs at San Francisco, submitting, under the provisions of section 14 of the act of June 10, 1890, the

protest, hereto annexed, marked Exhibit "B," described as follows:

Colls. No.	Board No.	Protestant.	Vessel.	Date of entry.
3876	26439 B.	Anglo-Californian Bank, Ltd.	Troop.	March 2, 1887.

That accompanying said letter was a letter from the naval officer of San Francisco, which is hereto attached marked Exhibit "C."

12 That also accompanying said letter from the collector of customs at San Francisco were two communications from the acting Secretary of the Treasury containing instructions as to the withdrawal of said merchandise from bonded warehouse, which are hereto attached marked Exhibits "D" and "E."

A letter was received by the board from the acting Secretary of the Treasury transmitting an agreed statement of facts relating to the importation in question signed by the parties in interest, and accepted by the board as correct. Said letter and inclosure are hereto annexed marked Exhibits "F" and "G."

Two affidavits by P. W. Bellingall and George H. Probasco were submitted and considered by the board. They are returned herewith as Exhibits "H" and "J."

That on the 19th of April, 1895, the board rendered their decision herein, a copy of which, known as G. A. 3054, is returned herewith marked Exhibit "K."

EXHIBIT "A."

OFFICE OF THE COLLECTOR OF CUSTOMS,
E. J. B. PORT OF SAN FRANCISCO, *March* 19, 1895.

Board of general appraisers, New York city, N. Y.

GENTLEMEN: Referring the board to the enclosed copy of department telegram of March 15th, 1895, I enclose herewith protest of the Anglo-Californian bank, the duly authorized agent of the Bank of California, against the action of this office in exacting duty at

13 the rate of $17.00 per ton under par. 147 act of March, 1883, and the additional duty of 10 per cent. prescribed by section 2970, Revised Statutes, on the withdrawal for consumption of 20 steel rails from warehouse bond No. 1031, imported by the Bank of California per British ship "Troop," March 2nd, 1887.

The action of this office was in accordance with department letter of October 21st, 1890. Copy enclosed.

The board will observe that the contention of the protestors is that the rails are entitled to be withdrawn at the rates prescribed by the act of August 28th, 1894. Section 14, act June 10th, 1894, has been complied with.

Respectfully, JOHN H. WISE, *Collector.*

(Endorsed:) 26439 B. Custom-house collector's office, San Francisco, Cal., Mar. 19, 1895, John H. Wise, collector. Subject: Protest of the Anglo-Cal. bank. Steel rails. Enclosures 3 M. Received by board of U. S. general appraisers. Mar. 25, 1895.

EXHIBIT "B."

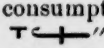
Protest of Anglo-Californian Bank, Limited.

SAN FRANCISCO, *March* 16, 1895.

To the collector of customs, district and port of San Francisco.

SIR: We hereby protest against the liquidation of our withdrawal entry and the assessment and payment of duties as exacted by you, at the rate of $17.00 per ton, under par. 147 of the act of Mar. 3, 1883, with 10 per cent. additional duty under section 2970
14 Revised Statutes, on a withdrawal entry for consumption of twenty steel rails from warehouse bond No. 1031.

Said 20 steel rails (which were imported Mar. 2, 1887, by the Bank of California in the Br. Sh. "Troop" from Barrow, and entered for warehouse, and are more fully described in bonded entry No. 1031 (invoice No. 2733) were withdrawn from U. S. bonded warehouse by protestants from bond 1031, on a proper withdrawal entry for consumption at port of original importation, which duly passed through the various departments of the collector's office and the naval office in the regular manner prescribed for withdrawal of all merchandise from warehouse for consumption. Duties on these 20



steel rails amount to $92.20 (being 4-18-2-13 at $17.00 per ton—$83.82 and 10 per cent. $8.38) were duly paid March 16, 1895. Although the three years expired March 2, 1890, since that time withdrawals against this bond (1031) have been permitted by the Treasury Department, and now show upon the records of the custom-house, duty paid as *bona fide* withdrawals for consumption, as follows: (26439 B)

Oct.	9, 1891	812	steel rails.
Mar.	31, 1892	625	" "
Apr.	14, 1892	1,217	" "
Aug.	6, 1892	122	" "
Sept.	26, 1892	1,623	" "
Mar.	7, 1893	406	" "
Mar.	13, 1894	70	" "
Mar.	24, 1894	1,116	" "

15 Inasmuch as these rails have been continued in warehouse under the terms of the original warehouse bond, with the sanction of the Hon. Secretary of the Treasury, all charges including storage, having been and still being paid by protest, it is claimed that no legal abandonment to the United States has occurred; that they are consequently entitled to be withdrawn for consumption, and are therefore subject to no other rate of duty than is provided for in Schedule C, paragraph 117, act of Aug. 28, 1894, the only existing legislation for the collection of duties on steel rails or railway bars, *i. e.*, seven-twentieths of one cent per pound.

It is claimed that the language of sec. 50, of the act of Oct. 1, 1890, applicable to merchandise in warehouse on Oct. 6, 1890, for which no permit of delivery to the importer or his agent had been issued, made the rate of duty ($17.00 per ton) provided for in par. 147 of act of March 3, 1883, inoperative, and subjected the rails withdrawn after Oct. 6, 1890, and up to Aug. 28, 1894, to the rate of duty in par. 141 of the act of Oct. 1, 1890, and that the enacting clause of the act of Aug. 28, 1894, in which appear the words, "or withdrawn for consumption," was intended as a substitute for section 50 of the act of Oct. 1, 1890.

It is also claimed that section 29, of the act of June 10, 1890, and section 50, of act of Oct., 1890, repealed sec. 2970, Revised Statutes (see S. S. 15517 G. A. 2827, dated Nov. 24, 1894). We therefore claim that duties should be assessed on these steel rails or railway
16 bars at the rate of seven-twentieths of one cent per pound only, under par. 117, Schedule C of the act of Aug. 28, 1894, and we pay the amount exacted solely to obtain possession of the rails, and claim the withdrawal entry should be readjusted, and the amount overcharged refunded to us.

Yours respectfully,

THE ANGLO-CALIFORNIAN BANK, LD.,
By IN. STEINHART, *Its Attorney-in-fact.*

(Endorsed:) 3876. Inv. No. 2733. Bond No. 1031. Protest. San Francisco, M'ch 16, 1895. Anglo-Californian Bank, Ltd., against liquidation of withdrawal entry, assessment and exaction of $17.00 per ton and 10 per cent. additional duty on certain steel rails withdrawn from warehouse and duties paid M'ch 16, 1895. Imported in the Br. Sh. "Troop" from Barrow, arrived M'ch 2, 1887. Received Mar. 18, 1895. Adjuster's office, custom-house, S. F., Cal. W. P. W. Bellingall, custom-house broker; office, 508 Battery street, S. F. 26439 B.

EXHIBIT "C."

Letter of Naval Officer to Collector.

OFFICE OF THE NAVAL OFFICER OF CUSTOMS,
PORT OF SAN FRANCISCO, *March 19th*, 1895.

Hon. John H. Wise, collector of the port.

SIR: The protest of the Anglo-Californian bank, in the case of steel rails covered by dep't letter of Oct. 21st, 1890, and dep't telegram of March 15th, 1895, is overruled. The case should go
17 to the G. A. for ascertainment of facts upon which the dep't may finally decide it.

Respectfully,

JOHN P. IRISH,
Naval Officer.

(Endorsed:) San Francisco, Cal., naval office, March 19, 1895, John P. Irish, naval officer. Subject: Protest of Anglo-Californian bank. Invoice No. 2733. W. H. bond, 1031. Steel rails. No. of inclosures, 3. 26439 B.

EXHIBIT "D."

Letter of Assistant Secretary of Treasury to Collector.

Copy.

TREASURY DEPARTMENT,
4244—F. OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *Oct.* 21, 1890.

Collector of customs, San Francisco, Cal.

SIR: The department is in receipt of your letter of the 11th instant, in which, referring to its telegram to you of the 9th instant, in relation to certain steel rails now in bonded warehouse which have been withheld from sale from time to time at the request of the Oregon Pacific Railroad Company; you state that you understand that said company intends to withdraw the rails and pay the duty thereon in a short time, and you request instructions as to whether the rails will be subject to duty at the rates prescribed by the acts of March 3, 1883, or at the rate prescribed by the act of October 1, 1890.

18 Upon examination of the records of the department it appears that on March 6th, last, Mr. T. E. Hogg, president of said company, made application for permission to withdraw and pay duty on the rails in question from time to time as required for use in the construction of the road before the time of the next regular sale, July,.1890; that the period of three years, from date of importation which they were allowed by law to remain in bonded warehouse expired on March 1, 1890; that this application was granted by telegram to you under date of March 7th, last, and that the time within which such withdrawals might be made was extended for the period of three months by letter addressed to you on June 30th last, and for a further period of six months by a telegram addressed to you on the 9th instant.

In reply I have to state that as the duties regular and additional had legally accrued on said rails before the passage of the act of October 1st, 1890, and the rails remained in bond merely by sufferance and not legally, they do not come within the perview of section 50, of the act of October 1st, 1890, and are not entitled to withdrawal at the reduced rate prescribed by said act.

You are therefore instructed to allow their withdrawal only on payment of the duties regular and additional which had accrued in March last.

Respectfully yours,
(Signed) O. L. SPAULDING,
Assistant Secretary.

No. enclosures, —. 26439 B.

19 *Telegram from Secretary of Treasury to Collector.*

Copy.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *March* 15, 1895.

Collector of customs, San Francisco, Cal.:

Bank of California or properly authorized representatives may, on application, make entry for one lot of not less than five tons steel rails, paying duty under act of eighty-three. In case of such entry, remainder of rails may be withheld from sale. Collect.

——— ———,
Acting Secretary.

Official business, commercial rates. Collect.

EXHIBIT "E."

Letter of Secretary of Treasury to Collector.

4244 F. TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *March* 15, 1895.

Collector of customs, San Francisco, Cal.

SIR: The department has had under deliberate consideration an application from the parties in interest for permission to withdraw from your custody, on payment of duty and charges, under the act of August 28, 1894, the steel rails which were imported in 1887, by the Bank of California for the Oregon Pacific Railway Company. The applicants set forth the facts in the history of this case, showing that the rails were duly entered on arrival, and were
20 placed in bonded warehouse where they have continued to remain until now, with the consent of this department, which was given in compliance with the urgent petitions of the importers. The question has been somewhat complicated by the fact that partial deliveries have been made from time to time, and that duties have been exacted under the tariff of 1890, in direct violation of department's instructions to the collector, under date of October 4, 1890.

The department's decision in the question at issue, necessarily involves principles which reach far beyond the special case which forms the subject of this communication. It establishes the statutes of all merchandise which has been suffered to remain in bond beyond the legal period of three years from the date of importation.

A reference to the decisions of the department for a long series of years shows that it has uniformly held that the duties found due on the warehouse bond at the date of its expiration became a debt col-

lectable from the proceeds of a sale of the goods or from the sureties on the bond, and that subsequent changes of tariff can neither increase nor decrease the amount of such debt.

The department finds no reason at this time for departing from the ruling above cited, and you are accordingly instructed that the amount of duty to be collected on the goods in question is the amount which was found to be due on final liquidation, and at the date of the expiration of the bond; that is to say, the duty assessed under the act of March 3, 1883.

21 Appreciating the conditions which affect this case, the department is not disposed to inflict unnecessary hardship upon the importers by a summary closure of the matter, and you are therefore authorized to permit the importers if they shall so elect to pay the duties upon and to have delivery of a small portion, say not less than four tons of the above steel rails. It may be that duties will be so paid under protest in order that the exaction of duty may be reviewed by the board of general appraisers. Should this prove to be the case, you are further authorized to delay the sale of the remaining property until a decision has been reached.

Respectfully yours,

(Signed) C. S. HAMLIN,
Acting Secretary.

EXHIBIT "F."

Letter of Secretary of Treasurer to Board.

4244—F. TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *April* 9, 1895.

To the president of the general board of appraisers, 125 Bleecker street, New York, N. Y.

SIR: Enclosed herewith please find statement of facts agreed upon between this department and the attorney of the Bank of California, San Francisco, relative to certain importations of steel rails, and to the withdrawal of the same from bonded warehouse.

22 It is understood that J. F. Evans, Esq., the attorney of the bank, will call at your office and sign the statement, which has already been signed by the Secretary of the Treasury. This paper is to be considered an exhibit in the case of the protest which was the subject of a recent review by your board.

Respectfully yours, C. S. HAMLIN,
Acting Secretary.

(One enclosure.) J. A. W. I. M. C.

(Endorsed:) 30048 T, 26439 B. President board U. S. general appraisers. C. S. Hamlin, act'g Sec't'y. Washington, D. C., April 9, '95. Encl. statement of facts for signature of attorney for protestants, etc. Received by board of U. S. general appraisers. April 11, 1895.

EXHIBIT "G."

4244—F.

Statement of Facts in the Case of Steel Rails Imported at San Francisco and Suffered to Remain in Bond Beyond Three Years.

For the purpose of convenient reference and to avoid the necessity of introducing confirmatory testimony before the board of United States general appraisers in the matter of the classification of certain steel rails imported by the Bank of California at the port of San Francisco, California, the following statement is accepted and agreed upon as containing the material facts concerning the importation of and the circumstances affecting the merchandise in question.

The records of the custom-house show that about 5,678
23 tons of steel rails were imported at San Francisco by five different vessels at various dates, as follows:

Per "Troop," March 2, 1887	2,249	tons
" "Yeoman," April 19, 1887	250	"
" "Iron Duke," May 10, 1887	2,051	"
" "Helenslea," May 12, 1887	600	"
" "Garfield," June 24, 1887	528	"
Total	5,678	"

That the merchandise remained in general order, unclaimed, until February 27, 1888, when a warehouse entry for each of these importations was made and bonds given by the Bank of California, as the importer and consignee, the duties secured by said bonds aggregating about $96,557.73; that the bonds so given are numbered 1031, 1033, 1034, 1035 and 1036, of the custom-house series; that the warehouse entries were liquidated under the act of March 3, 1883, at $17 per ton, and at the expiration of one year from date of importation, the additional duty of 10 per cent. prescribed by section 2970, R. S., was charged upon the bonds against the merchandise, amounting to the sum of $9,655.77.

It further appears that four withdrawals were made between September 21, 1888, and December 6, 1889, at the rates thus charged, and the duties paid thereon amounting to $29,192.20; that when the bonded period of three years was about to expire the Oregon Pacific Railroad Company, upon whose account the merchandise had been imported, represented to the Treasury Department
24 that serious casualties had occurred to its road by storms and floods, and consequent embarrassment of its affairs and requested a postponement of the sale required under section 2971, R. S., whereupon, the Secretary authorized the withdrawal of the merchandise from sale for a period of three months, and it appears that this was done without notice to, or the consent of the principal or sureties on the warehousing bonds; that at the expiration of the

three months, a further postponement of six months was authorized by the Secretary; that similar postponements have been renewed for periods of six months up to the present date, the Bank of California uniting in two instances in the application for delay: the renewal authorized September 16, 1893, having been on condition that sureties shall consent; that by department's letter and telegram to the collector of customs at San Francisco, dated March 15, 1895, the sale of the merchandise was further postponed pending the decision of the board of general appraisers upon a protest of the importers against the payment of duties at the rate prescribed by the act of 1883, which were exacted upon a withdrawal entry made by authority of the department on that date (copy of letter attached).

That under date of June 30, 1890, the department had authorized the collector at San Francisco to permit withdrawals for consumption of steel rails, from time to time, in such quantities as might be desired (copy attached); that on the 21st of October, 1890, in reply to an inquiry from the collector at San Francisco, the department held that withdrawals might be made by the importers, but
25 that the duties, regular and additional prescribed by the act of 1883, had legally accrued on said merchandise on the expiration of the three years prescribed by section 2971, R. S., before the tariff act of 1890 went into effect, and consequently the importers were not entitled to withdrawals at the reduced rates prescribed by the said act.

It further appears that notwithstanding these instructions, twelve withdrawals covering about 3,306 tons were made and duties paid thereon and accepted by the collector at the rate of $13.44 per ton, the rate prescribed by the act of 1890, and the additional duty of 10 per cent. prescribed by section 2970, R. S.

It further appears that about 2,372 tons of steel rails yet remain in bonded warehouse, which have been continuously in the custody of the Government since the date of original importation at the risk and expense of the owners, and that all the charges, including storage, have been paid by the owners up to the present date.

Upon the above state of facts the importers have recently offered to make withdrawal entry and pay the duties on the remainder of the merchandise at the rate prescribed by the tariff act of August 28, 1894. This offer has not been accepted by the Treasury Department, but authority has been given to make a withdrawal entry of a portion of the merchandise at the rate prescribed by the tariff act of 1883, in order that a decision of the board of general ap-
26 praisers and of the court, as to the legal rate of duty chargeable thereon when withdrawn for consumption, may be obtained.

CHARLES S. HAMLIN,
Acting Secretary of the Treasury.

J. M. C.
J. A. M.

J. F. EVANS,
Att'y for Protestants.

EXHIBIT "H."

Letter of Bellingall to Evans.

P. W. Bellingall, ship and custom-house broker, 508 Battery street, opposite post-office; telephone 984.

References: Donohue Kelly Banking Co., Murphy, Grant & Co.; J. N. Knowles, R. Dunsmu-r & Sons, Abner Doble Co., Jas. de Fremery & Co., John Rosenfeld's Sons, R. D. Chandler, Jno. L. Howard.

SAN FRANCISCO, *M'ch 19th*, 1895.

Mr. J. F. Evans, Washington, D. C.

DEAR EVANS: In regard to the steel rails of Oregon Pac. R. R., I want to say as broker for Col. Hoge and the Bank of California, that the extension of time on bonds as mentioned in protest forwarded to board of general appraisers at New York, said extension was granted by Secretary of the Treasury without any intervention of mine.

As to the collection of duties on withdrawals after passage of McKinley bill, I insisted on paying duty in accordance with sec. 50, said bill. No peculiar influence was brought to bear on any
27 official connected with the passing of entries through custom-house, on the contrary, I will remember having called on Spec. Dep. Collector Jerome after I had passed first withdrawal under McKinley act, and called his attention to fact that withdrawal clerk seemed to think there was a question as to rate of duty, whereupon Mr. Jerome asked for instructions from dep'tm't, the reply to his query I never saw, nor heard of to the best of my knowledge and belief, until after the arrival of Special Agent Hanlon and others at this port. I still hold my opinion of the law and am at a loss to see how the department can claim that the goods are not in bond and entitled to withdrawal, same as other goods so long as they admit that they can be withdrawn for consumption.

Respectfully, P. W. BELLINGALL.

Subscribed and sworn to before me this 20th day of March, 1895.

[SEAL.] A. F. DANGLADA,

Notary Public in and for the City and County of San Francisco, State of California.

EXHIBIT "J."

Affidavit of George H. Probasco.

I, George H. Probasco of San Francisco, State of California, do hereby certify that I am and have been since July 1, 1887, an employé of P. W. Bellingall, custom-house broker of San Francisco, and in such capacity prepared the custom-house warehouse
28 entry covering an importation of 9,126 steel rails imported by the Bank of California, ex the Br. Sh. "Troop" from Barrow,

arrived Mar. 2, 1887, and more fully described in warehouse entry bond No. 1031 (invoice No. 2733); that all the withdrawals made against this bond No. 1031, were prepared and written by me; that I saw department telegram of M'ch 7, 1890, which permitted these rails to remain in warehouse beyond the limit of three years; that I have seen and am familiar with other orders of like character made at different times by the Treasury Department relative to these rails, and that the withdrawals made by me at the rate of duty in vogue at the time of withdrawal were made in good faith under the impression that said rate was correct and proper; that I discussed with my employer the said P. W. Bellingall of the believed to be erroneous exaction of 10 per cent. additional duty under sec. 2,970, Revised Statutes, and that at no time, by intimation or otherwise, did I know or suspect of the existence of a letter, order or other document showing that these rails should be withdrawn only on the payment of $17.00 per ton, nor did I have any knowledge of the existence of such a document until the arrival here of Special Agents Hanlon and Crites, about June, 1894.

GEORGE H. PROBASCO.

Subscribed and sworn to before me this 18th day of M'ch, 1895.

[SEAL.] A. F. DANGLADA,

Notary Public in and for the City and County of San Francisco, State of California.

29 EXHIBIT "K."

Opinion of General Appraisers.

(G. A.—3054.)

Merchandise as remaining in bonded warehouse more than three years dutiable at the rate in force at the time of withdrawal.

Before the U. S. general appraisers at New York, April 19, 1895.

In the matter of the protest, 26439 *b*–3876, of the Anglo-Californian bank against the decision of the collector of customs, at San Francisco, as to the rate and amount of duties chargeable on certain merchandise, imported per "Troop;" arrived March 2, 1887.

Opinion by SHARRETTS, general appraiser:

We find the material facts in this case to be as follows, to wit:

The Bank of California at various times between March 2, and June 24, 1887, imported into the port of San Francisco, certain (T) steel rails aggregating 5,678 tons. These rails remained in general order unclaimed until February 27, 1888, when warehouse entries thereof were made and bonds given by the Bank of California as importer and consignee. Said warehouse entries were liquidated under the act of March 3, 1883, at $17 per ton, and at the expiration of one year from the date of the importation the additional duty of 10 per cent. prescribed by section 2970, Revised Statutes, was

charged up on the bonds against the merchandise. Between September 21, 1888, and December 6, 1889, four withdrawals for consumption were made and the amount of duties charged
30 thereon was paid. When the bonded period of three years was about to expire the Oregon Pacific Railroad Company, for whose account the steel rails in question had been imported, represented to the Treasury Department that serious casualties had occurred to its road by storms and floods, and requested a postponement of the sale of merchandise required under section 2971, Revised Statutes, whereupon the Secretary of the Treasury authorized a postponement of the sale for three months without giving due notice to, or having the consent of the principal or sureties on the warehouse bonds. Similar postponements have been allowed for periods of six months up to the present date, the Bank of California uniting in two instances in the application for delay. A postponement of the sale of the merchandise allowed by the Secretary of the Treasury, September 16, 1893, was conditioned upon the consent of the sureties on the bond. The final postponement was authorized by the Secretary of the Treasury, March 25, 1895, pending decision regarding the legal status of the goods by the board of general appraisers. Under date of June 30, 1890, more than three years after the date of importation, the Secretary of the Treasury authorized the collector at San Francisco to permit withdrawals for consumption of the steel rails in question, from time to time, in such quantities as might be desired. On October 21, 1890, the Treasury Department decided that withdrawals might be made under the act of 1890, by the importers, at the rates of duty regular and additional prescribed by the act of 1883. Notwithstanding this decision, 3,306 tons of steel rails were withdrawn for
31 consumption, and in addition to 10 per cent. as prescribed by section 2970, Revised Statutes, duties were paid thereon and accepted by the collector at $13.44 per ton, the rate prescribed therefor in act of October 1, 1890. All charges and expenses, including storage charges, have been paid, the importers recently offered to withdraw for consumption the remainder of the merchandise in bonded warehouse at the rate prescribed in paragraph 117, of the act of August 1, 1894. Permission to make such withdrawals has not been granted by the Secretary of the Treasury, but in lieu thereof authority has been given the collector to permit withdrawal entry to be made by the importers of a small portion of the merchandise, at the rates prescribed in the act of March 3, 1883, in order that a test case for judicial decision might be made. In accordance with the authority thus granted entry for consumption of twenty of the steel rails in question (weighing about 5 tons), was made by the importers, and duty was assessed thereon by the collector at $17 per ton, and ten per cent. additional under the act of March 3, 1883, the act in force at the time the merchandise was imported. Against this action the importers protested, claiming that the merchandise in question having been withdrawn for consumption after August, 1894, was properly dutiable at seven-twentieths of 1 cent per pound in accordance with the provisions of sec-

tion 1 and paragraph 117, of the present act. That protest is now before the board for decision.

With the goods still remaining in bonded warehouse, viz:
32 about 2,370 tons, we are not concerned, we are only to pass upon the rate and amount of duty chargeable upon the twenty steel rails covered by this protest. The Attorney General, under date of January 17, 1895, expressed the opinion that "goods imported and entered for warehouse prior to the act of 1894, and not withdrawn for consumption within three years from the date of original importation are unaffected by the new rates of duty, and the duties mentioned in section 2972, Revised Statutes, are the duties to which they were previously subject, whatever be the construction to be put upon this section in other respects. My opinion applies not only to goods imported within three years before the act of 1894 took effect, but to all goods theretofore imported, and there subject to the tariff rate of 1890." Section 1 of the act of 1894 provides "that on and after the first day of August, 1894, unless otherwise specially provided for in this act, there shall be levied, collected and paid upon all articles imported from foreign countries or withdrawn for consumption and mentioned in the schedules herein contained the rates of duty which are by the schedules and paragraphs respectively prescribed."

The words "or withdrawn for consumption" are new matter, not appearing in the acts of 1883 or 1890, and there is abundant proof furnished by the debates in Congress to show that they were intended to place all merchandise in bonded warehouses prior to August 1, 1894, and entered for consumption after that date upon a parity with respect to rates of duty with merchandise imported on
33 and after August 1, 1894. The use of the conjunction "or" instead of "and," is in itself persuasive of the intent of Congress in this respect, if not conclusive. There is no provision in the act of 1894 which by terms or even by implication, excludes any class of merchandise withdrawn for consumption after August 1, 1894, from entry at the reduced rates provided for therein.

Section 2970, of the Revised Statutes, was repealed by section 54, of the act of 1890, hence we need not refer to the provisions thereof. Section 2971, provides that any goods remaining in bonded warehouse beyond three years shall be regarded as abandoned to the Government, and sold under such regulations as the Secretary of the Treasury may prescribe, etc. The right of the Secretary of the Treasury to have authorized the sale of all the steel rails remaining in bonded warehouse more than three years after importation cannot be questioned, but the fact is that the twenty steel rails in question were not sold nor listed for sale, and that they were with his advice and consent withdrawn for consumption after August 1, 1894. Article 1031, Treasury Regulation for 1884, would seem to justify the Secretary of the Treasury in electing to permit withdrawal of the merchandise for consumption, instead of decreeing its sale. This point, however, in our opinion, is not a factor in the case.

It is not within our jurisdiction to pass upon the validity of the importer's entry. We can only pass upon the issue raised by this protest, and hold that the twenty steel rails in question, have been withdrawn for consumption after August 1, 1894, are dutia-
34 ble at seven-twentieths of 1 per cent. per pound under the provision of paragraph 117, act of 1894, for T rails.

The protest is sustained and the collector's decision is reversed.

WILBUR F. LUNT.
J. B. WILKINSON, JR.
THAD. S. SHARRETTS.

And for a certified statement of facts involved in said matter, as ascertained by them, the said board states that said facts are fully set forth in the decision aforementioned, and that no other facts were ascertained by said board than such as are shown by said decision and other exhibits here attached.

WILBUR F. LUNT,
J. B. WILKINSON, JR.,
THAD. S. SHARRETTS,
Board of U. S. General Appraisers.

(Endorsed:) U. S. circuit court. No. 12070. In the matter of the application of The Anglo-Californian Bank for a review of the decision of the board of U. S. general appraisers as to the rate and amount of duty on certain imported merchandise. Return of the board of U. S. general appraisers. Filed June 18, 1895. W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk.

35 THE UNITED STATES OF AMERICA:

In the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California.

The petition and application of the Secretary of the Treasury for a review, under an act of Congress approved June 10, 1890, entitled "An act to simplify the laws in relation to the collection of revenues," of the questions of law and fact involved in a decision of the board of general appraisers on duty at the port of New York, State of New York, in matter of the classification of certain (T) steel rails, merchandise imported by the Bank of California of San Francisco, California, into the port of San Francisco, the subsequent liquidation of duties whereon was protested by the Anglo-Californian Bank, Limited, at the same place.

Findings of Fact and Conclusions of Law.

This case and proceeding having come on regularly for hearing before the court in the matter provided by law and the act of June 10, 1890; and the court, after duly considering the evidence and the law, and being fully advised in the premises, having heretofore given and rendered its opinion herein; now, in accordance there-

with, hereby makes and renders its decision, finding the following facts and conclusions of law respecting the classification of the merchandise involved herein and the rate of duty imposed thereon under such classification:

36 *Findings of Fact.*

1.

The Bank of California, at various times between March 2, and June 24, 1887, imported into the port of San Francisco, certain (T) steel rails aggregating 5,678 tons.

2.

These rails remained in general order unclaimed, until February 27, 1888, when warehouse entries thereof were made and bonds given by the Bank of California, as the importer and consignee. Said warehouse entries were liquidated under the act of March 3, 1883, at $17 per ton, and at the expiration of one year from the date of importation, the additional duty of 10 per cent. prescribed by section 2970, Revised Statutes, was charged upon the bonds against the merchandise.

3.

Between September 21, 1888, and December 6, 1889, four withdrawals for consumption were made, and the amount of duties charged thereon was paid. When the bonded period of three years was about to expire, the Oregon Pacific Railroad Company, for whose account the steel rails in question had been imported, represented to the Treasury Department that serious casualties had occurred to its roads by storms and floods, and requested a postponement of the sales of merchandise required under section 2971, Revised Statutes, whereupon the Secretary of the Treasury authorized a postponement of the sale for three months without giving
37 due notice to, or having the consent of the principal or sureties on the warehouse bonds. Similar postponements have been allowed for periods of six months, up to the present date, the Bank of California uniting in two instances in the application for delay. A postponement of the sale of the merchandise allowed by the Secretary of the Treasury, September 16, 1893, was conditioned upon the consent of the sureties on the bond. The final postponement was authorized by the Secretary of the Treasury, March 25, 1895, pending decision regarding the legal status of the goods by the board of general appraisers.

4.

Under date of June 30, 1890, more than three years after the date of importation, the Secretary of the Treasury authorized the collector at San Francisco to permit withdrawals for consumption of the steel rails in question, from time to time, in such quantities as might be desired. On October 21, 1890, the Treasury Department decided

that withdrawals might be made by the importers, at the rates of duty regular and additional prescribed by the act of 1883. Notwithstanding this decision, 3,306 tons of the steel rails were withdrawn for consumption, and in addition to 10 per cent. as prescribed by section 2970 Revised Statutes, duties were paid thereon and accepted by the collector at $13.44 per ton, the rate prescribed therefor in the act of October 1, 1890.

5.

All charges and expenses, including storage charges, having
38 been paid, the importers, on the 8th day of February, 1895, offered to withdraw for consumption the remainder of the merchandise in bonded warehouse, at the rate prescribed in paragraph 117 of the act of August 28, 1894. Permission to make such withdrawal was not granted by the Secretary of the Treasury, but in lieu thereof authority was given the collector to permit withdrawal entry to be made by the importers of a small portion of the merchandise, at the rates prescribed in the act of March, 3, 1883, in order that a test case for judicial decision might be made as to the rates of duty properly chargeable.

6.

In accordance with the authority thus granted, entry for consumption of twenty of the rails in question (weighing about 5 tons), was made by the importers March 16, 1895, and duty was assessed thereon by the collector, at $17 per ton, and 10 per cent. additional, under the act of March 3, 1883, the act in force at the time the merchandise was imported. Against this action the importers have duly protested, claiming that the merchandise in question, having been withdrawn for consumption after August, 1894, was properly dutiable at seventwentieths of 1 cent per pound, in accordance with the provisions of section 1, and paragraph 117, of the present act of August 28, 1894.

39 *Conclusions of Law.*

As conclusions of law the court finds:

I.

That at the expiration of three years from the time of its original importation, to wit: on the 24th day of June, 1890, the merchandise in question became abandoned to the United States, and subject to sale as such, under sections 2970, 2971 and 2972, U. S. Revised Statutes, to satisfy the duties and charges thereon then in force, to wit: the duty of $17 a ton, under paragraph 147 of the tariff act of March 3, 1883, and 10 per cent. thereon with warehouse charges.

II.

The right of the United States to sell said merchandise at said time, and deduct from the proceeds thereof said amount of duties and charges, was a right accrued at said time to the United States,

and a liability incurred by said merchandise, and the importer thereof, within the meaning of section 29 of the customs administrative act of June 10, 1890; section 55 of the tariff act of October 1, 1890, and section 72 of the tariff act of August 28, 1894, and hence was preserved to the United States by said acts, and is now in full force and effect.

III.

That said section 2971, U. S. Revised Statutes, was and is not repealed or modified by said customs administrative act of June 10, 1890, in section 20 thereof, as amended, nor by said tariff act of October 1, 1890, in section 50 and 54 thereof, the latter amending said section 20, nor by said tariff act of August 28, 1894, in its enacting clause, but is now, and since its enactment, has been in full force and effect and the amount of duty and charges properly assessed against, and collected thereunder from the proceeds of the sale of said goods, or from the importer thereof, by the collector of customs for the port of San Francisco, California, are those in force at the said time of abandonment, to wit: the 24th day of June 1890, as provided in said tariff act of March 3, 1883.

IV.

That the withdrawal entry of said merchandise was properly liquidated by said collector of customs, and the amount of duties and charges exacted and collected by said collector upon the withdrawal of said merchandise from bond, to wit: the sum of $92.20 was lawfully exacted and collected.

V.

That the decision of the board of U. S. general appraisers herein is reversed and set aside, and the petitioner herein is entitled to a judgment therefor, with the costs against said importers.

Let judgment be entered in accordance therewith.

Dated November, 1895.

JOSEPH McKENNA,
Circuit Judge.

(Endorsed:) Filed November 7, 1895. W. J. Costigan, clerk.

41 THE UNITED STATES OF AMERICA:

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

The petition and application of the Secretary of the Treasury for a review, under an act of Congress approved June 10th, 1890, entitled "An act to simplify the laws in relation to the collection of revenues," of the questions of law and fact involved in a decision of the board of general appraisers on duty at the port of New York, State of New York, in the matter of the classification of certain (T) steel rails, merchandise imported by the Bank of California of San Francisco, California, into the port of said San Francisco, the subsequent liquidation of duties whereon was protested by the Anglo-Californian Bank, Limited, at the same place. No. 12070.

Judgment.

This matter came on to be tried before the court upon the petition, report of the United States general appraisers, and argument of counsel duly heard and considered, and the court having found the facts and conclusions of law therefrom, and the same having been filed, ordered that judgment be entered in accordance therewith.

Wherefore, by virtue of the law and the findings aforesaid, it is ordered, adjudged and decreed that the decision of the board of United States general appraisers herein, be, and hereby is reversed and set aside, and that said petitioner, the Secretary of the
42 Treasury of the United States, have and recover from the Bank of California, importers of the merchandise referred to in this matter, his costs and disbursements incurred in this matter, amounting to the sum of $34.85.

Entered this 7th day of November, A. D. 1895.

W. J. COSTIGAN, *Clerk.*

A true copy.
Attest: W. J. COSTIGAN, *Clerk.*

In the Circuit Court of the United States, Ninth Judicial Circuit in and for the Northern District of California.

In the matter of the application of the Secretary of the U. S. Treasury for a review of decision of U. S. general appraisers relative to certain 20 steel rails., etc. No. 12070.

Certificate to Judgment-roll.

I, W. J. Costigan, clerk of the circuit court of the United States of the ninth judicial circuit, northern district of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled matter.

Attest my hand and the seal of said circuit court this 7th day of November, 1895.

[SEAL.] W. J. COSTIGAN, *Clerk.*

(Endorsed:) Judgment-roll. Filed November 7, 1895. W. J. Costigan, clerk.

43 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

In the matter of the petition of the Secretary of the Treasury for review of a decision of the board of United States general appraisers relative to certain twenty steel rails. No. 12070.

Opinion.

Before the Honorable Joseph McKenna, circuit judge.

H. S. Foot, Esq., United States attorney, and Samuel Knight, Esq., assistant U. S. attorney, for petitioner; Charles A. Garter, Esq., and J. F. Evans, Esq., for respondents.

MONDAY, *September 16th*, 1895.

MCKENNA, *Circuit Judge:*

The facts of the case are stipulated by the parties and are cited in the opinion of the board of appraisers as follows: "The Bank of California at various times between March 2, and June 24, 1887, imported into the port of San Francisco certain (T) steel rails, aggregating 5,678 tons. These rails remained in general order unclaimed until February 27, 1888, when warehouse entries thereof were made and bonds given by the Bank of California as the importer and consignee. Said warehouse entries were liquidated under the act of March 3, 1883, at $17 per ton, and at the expiration of one year from the date of importation the additional duty of 10 per cent. prescribed by section 2970, Revised Statutes, was charges upon the bonds against the merchandise. Between September 21,
44 1888, and December 6, 1889, four withdrawals for consumption were made and the amount of duties charged thereon was paid. When the bonded period of three years was about to expire the Oregon Pacific Railroad Company, for whose account the steel rails in question had been imported, represented to the Treasury Department that serious casualties had occurred to its road by storms and floods, and requested a postponement of the sale of merchandise required under section 2971, Revised Statutes, whereupon the Secretary of the Treasury authorized a postponement of the sale for three months without giving due notice to or having the consent of the principal or sureties on the warehouse bonds. Similar postponements have been allowed for periods of six months up to the present date, the Bank of California uniting in two instances in the application for delay. A postponement of the sale of the merchandise allowed by the Secretary of the Treasury September 16, 1893, was conditioned upon the consent of the sureties on the bond. The final postponement was authorized by the Secretary of the Treasury March 25, 1895, pending decision regarding the legal status of the goods by the board of general appraisers. Under date of June 30, 1890, more than three years after the date of importation, the Sec-

retary of the Treasury authorized the collector at San Francisco to permit withdrawals for consumption of the steel rails in question, from time to time, in such quantities as might be desired. On October 21, 1890, the Treasury Department decided that withdrawals might be made under the act of 1890, by the importers, at the rates of duty regular and additional prescribed by the act of 1883. Not-
45 withstanding this decision, 3,306 tons of the steel rails were withdrawn for consumption, and in addition to 10 per cent. as prescribed by section 2970 Revised Statutes, duties were paid thereon and accepted by the collector at $13.44 per ton, the rate prescribed therefor in the act of October 1, 1890. All charges and expenses, including storage charges, having been paid, the importers recently offered to withdraw for consumption the remainder of the merchandise in bonded warehouse at the rate prescribed in paragraph 117 of the act of August 1, 1894. Permission to make such withdrawal has been granted by the Secretary of the Treasury, but in lieu thereof authority was given the collector to permit withdrawal entry to be made by the importers of a small portion of the merchandise at the rates prescribed in the act of March 3, 1883, in order that a test case for judicial decision might be made. In accordance with the authority thus granted, entry for consumption of twenty of the rails in question (weighing about 5 tons) was made by the importers, and duty was assessed thereon by the collector at $17 per ton and 10 per cent. additional under the act of March 3, 1883, the act in force at the time the merchandise was imported. Against this action the importers protested, claiming that the merchandise in question having been withdrawn for consumption after August, 1894, was properly dutiable at seven-twentieths of 1 cent per pound in accordance with the provisions of section 1, and paragraph 117 of the present act."

The tariff act of 1883 was in force at the time of the im-
46 portation of the rails, and continued in force until the enactment of the act of 1890, known as the McKinley bill. Under the latter act, the duty was made $13 per ton, and under the act of August, 1894, known as the Wilson act, it was made $7.84.

As is well known, imported merchandise could be entered for immediate consumption, or it could be entered for warehousing; and in the latter case were certain provisions of law applicable to it.

Section 2970, R. S., provided for the periods for which, and the terms upon which merchandise could remain in bond without paying duty. It could remain for one or three years, and during such times it could be withdrawn for consumption. If in one year, "on payment of the duties and charges, to which it may be subject by law at that time." If after one year, and before the expiration of three years, "on payment of the duties assessed on the *original entry and charges*, and an additional duty of ten per centum of the amount of such duties and charges. (The italics are mine.) After three years the permission to withdraw goods for consumption expired, and section 2971, provided that "any goods remaining in public store, or bonded warehouse beyond 3 years, shall be regarded as abandoned to the Government, and sold under such regulations as

the Secretary of the Treasury may prescribe, and the proceeds paid into the Treasury." But section 2972, provided that the Secretary in case of sale may pay to the owner, &c., the proceeds thereof after deducting duties, charges and expenses.

In 1890, Congress enacted a law to simplify the collection of revenues, called the administrative act, section 20, of which
47 provided for the withdrawal for consumption of bonded goods, which was amended by section 54, of the McKinley act. The section as amended is as follows, omitting a proviso with which we are not concerned: "That any merchandise deposited in bond, in any public or private bonded warehouse may be withdrawn for consumption within 3 years from the date of original importation on payment of the duties and charges to which it may be subject by law at the time of such withdrawal." The difference between this section and section 2970 of the R. S., is that it makes but one period—3 years, and provides that the goods withdrawn any time within it shall be subject to the duty then provided by law. This act contained no provision for goods not withdrawn within 3 years, nor did the administrative act have such provision. If left provided for at all, it was by sections 2971 and 2972 R. S., *supra*. The administrative act explicitly repealed a number of sections of the R. S., but not those sections, and added "and all other acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

"But the repeal of existing laws or modifications thereof embraced in this act shall not affect any act done or any right accruing or accrued * * * but all liabilities under said law shall continue and may be enforced in the same manner as if said repeal or modifications had not been made. * * *"

Section 50 of the McKinley act, which is the only other one necessary to quote in full, is as follows:

"SEC. 50. That on and after the day when this act shall go into effect all goods, wares and merchandise previously imported,
48 for which no entry has been made, and all goods, wares and merchandise previously entered without payment of duty and under bond for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been issued, shall be subjected to other duty upon the entry or the withdrawal thereof than if the same were imported respectively after that day: Provided, that any imported merchandise deposited in bond in any public or private bonded warehouse, having been so deposited prior to the first day of October, eighteen hundred and ninety, may be withdrawn for consumption at any time prior to February first, eighteen hundred and ninety-one, upon the payment of duties at the rates in force prior to the passage of this act: Provided, further, that when duties are based upon the weight of merchandise deposited in public or private bonded warehouse, said duties shall be levied and collected upon the weight of such merchandise at the time of its withdrawal."

The act also repealed all prior inconsistent laws, but saved all

rights which had accrued, by the same words as the administrative act, *supra*.

The Wilson act contained no administrative provisions with which this case is concerned. A claim however, is based on its first section, which will be referred to hereafter.

From this statement of the facts and the statutes, the question is, to what duty was the merchandise subject? The Secretary of the Treasury decided that of the act of 1883, or $17 per ton, and on the grounds which apply to the whole importation. The board
49 of appraisers decided that of 1894, or $7.84 per ton, but on grounds which confine the decision to 20 rails, or 5 tons only. This is to be regretted, as it leaves us without the views of the board (necessarily valuable) of the regulations of the act of Congress.

The board bases its decision on the act of the Secretary in authorizing the withdrawal of the merchandise for consumption, but the stipulation of the parties is that this was to enable the right to be tested, not to make the right. Besides, if the importers can claim this against intention, the difficulties of the matter are not solved or even evaded. The question then occurs, what right has the Secretary to permit a withdrawal for consumption, under the circumstances, or if he have this right as an alternative of a sale, at what duty; and the question can only be answered by determining the changes which the McKinley and Wilson acts make in pre-existing laws. Necessarily therefore, a decision as to the five tons involved in this case is a test of the whole importation, and I have given the contentions of parties a proportionate attention.

The merchandise as we have seen was imported in 1887, and entered for warehousing Feb. 27, 1888, and the duties liquidated under the act of 1883, and a bond given by the importers to secure their payment. Under the law the rights and liabilities of the importers were very plain. They could have withdrawn the merchandise for consumption in one year upon paying the duties, to wit: $17 per ton—that being the duty they were subject to, the law of 1883 being then in force. Or, after said year and within three years from June, 1887 (the date of the last importa-
50 tion), they could have withdrawn the merchandise upon paying such duty, and 10 per cent. additional duty. Some of the merchandise was withdrawn before the expiration of three years, and the duties paid, but the greater part of it, including the rails in controversy, was not withdrawn, and on the 24th day of June, 1890, became subject to sections 2971, 2972 and 2973 of the Revised Statutes, *supra*. In other words, became to be regarded as abandoned to the Government, and to be subject to sale by the Secretary of the Treasury to satisfy the then duty, to wit: $17 and 10 per cent. additional and charges. This was the status at that date—the right of the Government—the liability of the merchandise indisputably, and were only not exacted or enforced because the Oregon Pacific Railway Co., for whose account the merchandise was imported, requested a postponement of the sale for three months, representing that serious casualties had occurred to its road. Other postponements by like request, the sureties on warehouse bond consenting, for periods

of six months were given. Pending these periods the tariff acts with the provision *supra*, were passed.

The question raised by these facts is direct. Did the right which undoubtedly accrued on the 24th of June, 1890, continue after the passage of the McKinley and Wilson acts. Or, using saving language—was it not, regarding the Government, "a right accruing or accrued"—was it not regarding the merchandise "a liability under a prior law," continued under said acts.

It seems necessarily that the answer must be in the affirm-
51 ative. The Government had a right in the juridical sense of that word, that is an enforceable claim. It came into existence in June, 1894, and existed for nearly two months before the passage of the administrative act, and might have been enforced during such time, but for the solicitation of the parties interested in the merchandise, or at any rate, could have been enforced. It was a right "accruing or accrued," therefore, in the legal and proper sense of those words, and presumably in the sense in which they were intended by such act and the McKinley act.

Prior to the decision of the Supreme Court in U. S. *vs.* Burr, — Supreme Court Reporter, page 1002, it could have been plausibly contended that the rights saved by the act were not those of the United States or not claims to duties, and the former was so held by the circuit court (66 Fed., 742). The Supreme Court, however, took a different view, and held that the act preserved the rights of the Government as well as the rights of the importers and included claims to duties.

The conflict settled in that case was between the McKinley and Wilson acts, and the merchandise in controversy arrived Aug. 7, 1894, duties were paid Aug. 8th, and the merchandise delivered Aug. 11th, but it was not until Aug. 28th, that the fact was stamped on the entry that the goods were liquidated as entered. The Wilson act went into effect Aug. 28th, but its first section provided "that on and after the 1st day of August, 1894 * * * there
52 shall be levied and collected * * * the rates of duty which are by the schedules and paragraphs respectively prescribed." * * * And it was contended from the plain language the court was imperatively required to conclude that it was the intention of Congress that the act should have a retrospective operation as of August 1st, although it did not become a law until that date. The court refused to make this literal application of the words of the statute and said through Chief Justice Fuller:

"And upon the threshold we are met with the fact that the act of October 1, 1890, was not repealed in terms until August 28, 1894; and that the repealing section of the latter act kept in force every right and liability of the Government or of any person which had been incurred or accrued prior to the passage thereof, and thereby every such right or liability was excepted out of the effect sought to be given to the first section."

"The right of the Government to duties under the tariff law, which existed between August 1st, and August 28th, was a right accruing prior to the passage of the act of 1894 (that is, the date

when the bill became a law); and the obligation of the importers between August 1st and August 28th, to pay the duties on their entries, under the existing tariff law, was a liability under that law arising prior to the passage of the act of 1894; and, if Congress intended that section 1 should relate back to August 1st, still the intention is quite as apparent that the act of October, 1890, should remain in full force and effect until the passage of the new act on August 28th, and that all acts done, rights accrued, and lia-
53 bilities incurred under the earlier act, prior to the repeal, should be saved from the effect thereof as to all parties interested, the United States included."

This construction satisfies the natural meaning of the language of the acts, and gives effect, and consistent effect to every provision. But without the provisions of the acts, saving rights and continuing liabilities accruing or accrued under prior laws, it is disputable if the contention of the importers could be sustained under the ruling in Fabri, *vs.* Murphy, 95 U. S., 191.

In that case it appeared that sugar was imported in Nov. 1869, which was entered for warehousing. It was classified under the law then in force as No. 12 Dutch standard, and the duty of 3 cents per pound assessed against it. While it was in the warehouse and before the expiration of a year, the act of Dec. 22, 1870, was passed, providing for a lower rate of duty, and making it applicable to goods in bonded warehouse upon the entry thereof for consumption. Under this act the sugars were reclassified by appraisers as No. 7 Dutch standard, and a rate of entry noted at 1¾ cents per pound. On the 20th of January, 1871, the importers made a withdrawal entry of the sugars for consumption, and the collector charged them with the lesser duty of the act of 1870, but exacted as a penalty 10 per cent. additional of the duties which had been assessed on the original entry. At the time of the original entry the act of March 14, 1866, was in force. This was the original of section 2970, R. S., and provided that goods could be withdrawn for consump-
54 tion within one year from the date of original importation on payment of the duties and charges to which they may then be subjected by law. After a year, and before the expiration of three years they could be so withdrawn on payment of the duties assessed on the original entry, and charges and an additional 10 per cent. of the amount of such duties and charges.

Payment of the original duty was made without objection, but protest was made against payment of the ten per cent., and suit was instituted to recover the amount. Judgment went against the importers, and it was affirmed by the supreme court.

There was no express repeal of the old act, but its consistency or inconsistency with the new one was directly presented for decision. The supreme court held that there was no inconsistency. Mr. Justice Clifford, speaking for the court, repeating the rule of Wood *vs.* United States, 16 Pet. 342, said that to work a repeal of an old law there must be a positive repugnancy between it and the new one, and further said that such repeal is not favored in any case and must always meet with disfavor where the attempt is made to ap

ply the principle in the construction of revenue laws of the United States.

"Acts of Congress," the learned judge also said, "are often very complex in their provisions in order to enable those charged with their execution to protect the Treasury against the constant attempts of importers to evade the payment of new duties or increased taxation. New regulations often become necessary to enable officers of the customs to defeat such designs; and the rule is that in
55 such cases there ought to be a manifest and irreconcilable repugnancy to warrant the conclusion, that the old law is abrogated, or that the new law was intended to supersede the antecedent provision. Aldridge *v.* Williams, 3 How., 9; The Distilled Spirits, 11 Wall. 256."

Counsel for claimants, cites to sustain his contention, *In re* Schmid, 54 Fe*b.* 145, and U. S. *vs.* Abbott, 20 Court of Claims Rep. 281.

The facts in *In re* Schmid, were not the same as the facts of the case at bar. In that case the merchandise was imported, and entered Jan. 10, and March 9, 1889, and remained in warehouse until Jan. 1891—in other words, the time during which it could be withdrawn, the consumption had not expired, hence it was in one of the classes of sec. 50, of the McKinley act, that is, was under bond for warehousing (to quote the language of the section), and subject to withdrawal for consumption, upon which act and time, the duties were to be levied, as of October 1st, 1890.

This distinguishes the case from the case at bar. In the case at bar the time within which the steel rails could have been withdrawn had expired fully under the law to which they were subject when imported, and before the enactment of the administrative or McKinley acts, and therefore the Government's claim was a "right accrued," and saved by the provision of those statutes that then repealing clauses or modifications should not affect "any right accruing or accrued."

It is certainly the duty of interpretation to give effect to these provisions as well as to sec. 50, and both can only be given effect by respectively applying them to the different conditions
56 recognized or created by the law. The former where rights have accrued against the merchandise—the latter where it is still subject to the demand of the importers. The difference in the conditions may be less substantial under the late acts than under the prior ones, but they are still maintained.

The administrative act (sec. 20), and the McKinley act (sec. 54), which amended it, provide for a bonded period of 3 years, and neither repeal sec. 2971 of the R. S. which provides for abandonment of the merchandise and the right of the Secretary of the Treasury to sell it.

In Abbott *vs.* U. S., the fact as to the time the merchandise was in the warehouse is the same as the case at bar, that is, it remained there more than three years after its importation. The question came up on a refund of duties, they having been paid within the three years. This, however, makes no difference in principle, and the case sustains the contention of the importers. It, however, seems

not to have been very well considered. It involved the construction of sec. 10 of the tariff act of 1883, and sections 2970 and 2971 of the R. S., *supra*. Sec. 10 of the act of 1883 was a repetition of the act of 1870, and section 2970, of the R. S., was a substantial repetition of the act of March 14, 1866. In Fabri *vs.* Murphy, *supra*, both acts were passed on and held consistent, and hence, both in force; and the additional duties prescribed by the latter, legal. If the provisions of the acts were consistent in 1870, they were consistent in 1885. Fabri *vs.* Murphy, does not ap-
57 pear to have been drawn to the attention of the Court of Claims. The decision no doubt responded only to the points presented, and in the manner presented, and hence, took only a partial view of the statutes. The court seemed to be controlled by what it deemed the all-embracing language of section 10, of the act of 1883, and conceived that because the proceeds of the sale of merchandise derelict under section 2971, were not absolutely forfeited, the Government could not have any rights in it at all, a view which ignored, even if it could be otherwise sustained, sec. 13, of the act of 1883, which provided, "that the repeal of existing laws or modification thereof, embraced in this section, shall not affect any act done or right accrued * * * before the said repeal or modifications; but all rights and liabilities under said laws shall continue, and may be enforced in the same manner as if said repeal or modifications had not been made." * * *

The claimants contend that the Wilson act is even more comprehensive and conclusive than the McKinley act, and determines the rate of duty to be collected on the rails in controversy at $7.84 a ton.

The first section which is relied on, is as follows:

"Be it enacted, &c. That on and after the first day of August, 1894, unless otherwise specifically provided for in this act, there shall be levied and collected and paid upon all articles imported from foreign countries or withdrawn for consumption and mentioned in the schedules herein contained, the rates of duty which are by the schedules and paragraphs respectively prescribed, namely: * * *

58 "117. Railway bars made of iron or steel, and railway bars made in part of steel T rails and punched iron or flat rails, seven-twentieths of one cent. per pound."

Section 72 repealed prior inconsistent laws, but preserved rights and liabilities which had accrued or arisen thereunder substantially in the same language quoted from the administrative and McKinley acts, *supra*.

The efficiency of the section to the contention is in the words "withdrawn for consumption." But what they mean has already been sufficiently explained. As we have seen all the acts provided a period during which goods could remain in bond—they all fix it at three years, and it is only within this period that goods may be "withdrawn for consumption," and hence it is to this period and to what may be done within it that the language of the section must be regarded as addressed. By so regarding it, no policy of the new

act is disappointed, as urged by counsel for claimant. Its policy undoubtedly was to reduce rates, but it was consistent—indeed suitable—to have considered some things as done, some rights having accrued, and to leave them undisturbed. Besides, we know that the authors and advocates of the measure in the House of Representatives did not deem that its policy depended upon the use of the words "withdrawn for consumption" in the situation in which we find them in the act. They were inserted in the Senate. Does the debate there show their purpose?

59 Counsel says that it shows agreement between Senators "presenting," to quote counsel, "all shades of opinion on tariff policy on the following propositions: (1) that there should be the same rate for goods in bond as for those to arrive; (2) that goods withdrawn from bond should pay the same rate of duty as others; and (3) that the words of the amendment would certainly insure these objects." Senator Hale, however, who participated in the debate, and who ought to have been in the center of its certainty and light—charged, without distinguishing by shades of tariff opinion, the most veteran Senators with diversity on every proposition concerning the amendment, and said, "While there is not anything partisan in the four simple words 'or withdrawn for consumption,' yet there were as many theories advanced as to what the amendment meant and whether it ought to be in the bill or out, and as to whether it is found in some other section of some other law, as there were Senators who rose in their seats to discuss the matter." And addressing the advocates of the measure specially, he said: "But let us at least be relieved from uncertainty about what ought to be the plainest provision, and appeal to the Senator from Missouri (Mr. Vest), and through him to the Senator from Arkansas (Mr. Jones), and through both of them, to the Senator from Tennessee (Mr. Hawes), and through all three of them, to the Senator from Texas (Mr. Mills), to let this matter go out for the present, and get together about the table in the room of the Committee on Finance, call in experts from both sides, and give us some language that is authoritative and the meaning of which we know."

60 But assuming that agreement on the proposition stated by counsel may be discerned in the debate, it may also be discerned what was meant by being "in bond," and "withdrawn for consumption," and that the amendment was only the repetition of existing law, these give us some guide to the meaning, and show that its general language was addressed to, and intended to provide for a well-known condition, and was not intended to assimilate all conditions. See remarks of Senators Aldrich, Jones, Vest, Allison and Sherman, Congressional Record, May 10, 1894, page 5430 *et seq.*

A question identical with the one at bar arose under the act of 1883, and was decided by Attorney General Brewster, in accordance with views herein expressed (17 Attorney General's Opinion-, 650). See also opinion of Attorney General Olney of January 17, 1895, substantially to the same effect.

I think, therefore, that the rails in controversy became subject to duty under the act of 1883, and to such duty the Government had acquired a right before the passage of the McKinley and Wilson acts, which was preserved and continued by them.

The decision of the board of general appraisers is, therefore, reversed.

(Endorsed:) Opinion. Filed September 16, 1895. W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk.

61 THE UNITED STATES OF AMERICA:

In the Circuit Court of the United States of America, Ninth Circuit, in and for the Northern District of California.

THE SECRETARY OF THE TREASURY, Petitioner and Appellee,
vs.
THE ANGLO-CALIFORNIAN BANK (LIMITED), Respondent and Appellant.
} No. 12070.

Petition for Order Allowing Appeal.

In the matter of the petition and application of the Secretary of the Treasury for a review, under an act of Congress approved June 10, 1890, entitled "An act to simplify the laws in relation to the collection of revenues," of the questions of law and fact involved in a decision of the board of general appraisers on duty at the port of New York, State of New York, in matter of the classification of certain (T) steel rails, merchandise imported by the Bank of California of San Francisco, California, into the port of San Francisco, the subsequent liquidation of duties whereon was protested by the Anglo-Californian Bank (Limited) at the same place.

The above-named respondent, The Anglo-Californian Bank, (Limited), conceiving itself aggrieved by the judgment and
62 decision made and entered on the 7th day of November, A. D. 1895, in the above-entitled matter, does hereby appeal from said judgment and decision to the United States circuit court of appeals for the ninth circuit for the reason that said judgment and decision was made and entered in a proceeding relative to the customs revenue laws of the United States, and many other cases now pending depend upon the final judgment in the present proceedings as precedents, and the records in this case show that the question involved is of such importance as to require a review of the judgment and decision of said circuit court by the circuit court of appeals, and for the further reasons specified in the assignment of errors which is filed herewith, and it prays that an appeal may be allowed, and that a transcript of the records, proceedings and papers upon which said judgment and decision was made, duly au-

thenticated, may be sent to the said United States circuit court of appeals.

CHAS. A. GARTER,
Attorney for Respondent and Appellant.

63 THE UNITED STATES OF AMERICA:

In the Circuit Court of the United States of America, Ninth Circuit, in and for the Northern District of California.

In the Matter of The SECRETARY OF THE TREASURY, Petitioner and Appellee,
vs.
THE ANGLO-CALIFORNIAN BANK (LIMITED), Respondents *for* Appellant.

Assignment of Errors on Appeal.

Now on this 4th day of December, A. D. 1895, comes the above-named appellant and respondent, by Charles A. Garter, its attorney, and says that the court erred in making the following conclusions of law, to wit:

1. The court erred in its first conclusion of law, which is as follows, to wit:

"That the merchandise involved in this controversy became abandoned to the Government within the meaning of the law, and section 2971, U. S., at the expiration of three years from the date of its original importation; and, at the time of its withdrawal from bond, as aforesaid, such merchandise was such abandoned goods and was liable to be sold under the provisions of section- 2971, 2972, U. S., R. S."

2. The court erred in its second conclusion of law, which is as follows, to wit:

64 "That such merchandise upon its withdrawal from bond aforesaid, was subject to the rates of duty in force at the time of its abandonment, as contained in the tariff act of March 3, 1883, and section 2970, U. S., R. S., regardless of changes in tariff schedules contained in the tariff acts of October 1, 1890, and August 1, 1894, subsequent to such abandonment."

3. The court erred in its third conclusion of law, which is as follows, to wit:

"That said rails are dutiable upon such withdrawals at the rate of $17.00 a ton, under paragraph 147 of said tariff act of March 3, 1883, and such warehouse charges as may have by law accrued thereon, together with ten per cent. of such duties and charges additional thereto, under section 2970, U. S., R. S."

4. The court erred in its fourth conclusion of law, which is as follows, to wit:

"That the decision of the board of U. S. general appraisers herein is reversed, and the amount of duty exacted by the collector of customs for the port of San Francisco, upon the withdrawal of said

merchandise from bond, was lawfully exacted, and the collector of customs for the port of San Francisco should, and he is hereby directed to liquidate the withdrawal entry of said steel rails accordingly."

That the judgment and decision in the above-entitled matter is erroneous, and against the just right of said respondent for the following reasons:

65 1. In that it is ordered, adjudged and decreed that the decision of the board of the United States general appraisers should be reversed, and that the merchandise covered by the decision of the said board of general appraisers should be classified for duty under act of March 3, 1883, at the rate of seventeen ($17) dollars per ton, and ten per centum additional thereon, under section 2970 of the Revised Statutes of the United States.

2. In that said court did not make a judgment or decree affirming the decision of the board of United States general appraisers herein, and adjudged that the said merchandise should be classified for duty at seven-twentieths of one cent per pound, under paragraph 117, Schedule "C," of the tariff act of August 28, 1894, as railway bars specially provided for therein.

3. In that said court did not hold and decide that the merchandise involved herein was legally in bonded warehouse at the time of its withdrawal for consumption, and that the Secretary of the Treasury was vested with legal authority to authorize its withdrawal for consumption.

4. In that said court held and decided that the tariff act of March 3, 1883, has not been repealed by subsequent legislation, and that section 2970 of the United States Revised Statutes has not been repealed.

5. Because the said judgment and decision is not supported
66 by the findings of fact of the court, but is against and contrary to said findings and contrary to law.

6. Because the said judgment and decision is not supported by the findings of fact of the court, but is against and contrary to said findings and contrary to law in this, that the findings show that the merchandise involved was withdrawn for consumption on the 15th day of March, 1895—that is, after August 28, 1894, at which last-mentioned date an act of Congress, entitled "An act to reduce taxation, to provide revenue for the Government and for other purposes" went into effect and was in force at the time of said withdrawal; and the rate of duty, seven-twentieths of one cent per pound, prescribed by said last-mentioned act applied to said merchandise.

7. The said judgment and decision is erroneous and contrary to law in that it purports to make applicable to said merchandise the rate of duty prescribed by the tariff act of March 3, 1883, and an additional duty of 10 per cent. prescribed by section 2970 of the Revised Statutes of the United States, whereas the said last-mentioned act and said section 2970 had been repealed at the time of said withdrawal for consumption, and the provisions thereof did not apply to said merchandise.

8. The said judgment and decision is erroneous in form and con-

trary to law in this, to wit: it purports to be a judgment of reversal of a decision of the board of appraisers, and does not in terms prescribe the rate or amount of duty to be levied and collected upon the merchandise involved.

67 Wherefore, the said respondent prays that the said judgment and decision of the said circuit court be reversed by said circuit court of appeals of the ninth circuit, and that said circuit court be directed to enter a judgment and decision in accordance with law upon the facts as they appear in said findings.

CHAS. A. GARTER,
Attorney for Respondent.

(Endorsed:) Petition on appeal and assignment of errors. Due service of within petition for appeal and assignment of errors admitted this 4th day of Dec., 1895. H. S. Foote, U. S. att'y, and attorney for appellee. Filed December 4, 1895. W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk.

THE UNITED STATES OF AMERICA:

In the Circuit Court of the United States of America, Ninth Circuit, in and for the Northern District of California.

In the Matter of THE SECRETARY OF THE TREASURY, Petitioner and Appellee,
vs.
THE ANGLO-CALIFORNIAN BANK (LIMITED), Respondent and Appellant.

Order Allowing Appeal.

The Anglo-Californian Bank, Limited, the above-named respondent, having on this day presented its petition for appeal from

68 the judgment and decision of this court heretofore, to wit, on the 7th day of November, A. D. 1895, made and given and rendered in the above-entitled matter, and having at the same time filed its assignment of errors, and it satisfactorily appearing to me that the question involved is of such importance as to require a review of such judgment and decision, by the circuit court of appeals, of the United States, of the ninth circuit.

It is hereby ordered that such appeal be, and the same is hereby allowed, as prayed for;

That said respondent give bonds in the sum of $500, with two sufficient sureties, conditioned to answer all damages, to make its plea good and prosecute the appeal to effect, and conditioned in all respects according to law.

That thereafter upon the filing and approval of said bond, a transcript of records, proceedings and papers upon which the judgment and decision herein was rendered duly authenticated, be sent to the United States circuit court of appeals for the ninth circuit.

JOSEPH McKENNA,
Circuit Judge.

(Endorsed:) Due service of within order granting appeal admitted this 4th day of Dec., 1895. H. S. Foote, U. S. att'y, and attorney for appellee. Filed December 4, 1895. W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk.

69 THE UNITED STATES OF AMERICA:

In the Circuit Court of the United States of America, Ninth Circuit in and for the Northern District of California.

In the Matter of THE SECRETARY OF THE TREASURY, Petitioner and Appellee,
vs.
THE ANGLO-CALIFORNIAN BANK (LIMITED), Respondent and Appellant. } No. 12070.

Bond on Appeal.

Know all men by these presents, that we, the Anglo-Californian Bank, Limited, as principal, and Ignatz Steinhart and Elbridge Durbrow, as sureties are held and firmly bound unto the Secretary of the Treasury of the United States, in the full and just sum of five hundred dollars, to be paid to the said Secretary of the Treasury of the United States, his successors in office and assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals and dated this 4th day of December, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas, lately at a session of the circuit court of the United States, in and for the ninth circuit, northern district of California, in a suit and matter depending in said court, between the Anglo-Californian Bank, Limited, and the Secretary of the Treas-
70 ury of the United States, a judgment and decision was rendered against the said The Anglo-Californian Bank, Limited, and the said The Anglo-Californian Bank, Limited, having obtained an appeal to the United States circuit court of appeals of the ninth circuit, and filed a copy thereof in the clerk's office of said court, to reverse the judgment and decision in the aforesaid matter, and a citation having been issued directed to the said Secretary of the Treasury, citing and admonishing him, to be, and appear at a session of the said circuit court of appeals, for the ninth circuit, to be holden at the city and county of San Francisco, in said circuit, on the 3rd day of January next.

Now the condition of the above obligation is such, that if the said The Anglo-Californian Bank, Limited, shall prosecute said appeal to effect and answer all damages and costs, if it fail to make the said

plea good, then the above obligation to be void, else to remain in full force and virtue.

THE ANGLO-CALIFORNIAN BANK, L'D,
By P. N. LILIENTHAL, *Manager.*
IGNATZ STEINHART.
ELBRIDGE DURBROW.

Signed and sealed in the presence of—
JESSE W. LILIENTHAL.

Approved by—
JOSEPH McKENNA,
Circuit Judge.

71 STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

Ignatz Steinhart and Elbridge Durbrow, each being duly sworn, deposes and says, that he is a householder, residing in said city and county of San Francisco, State aforesaid, and is worth the sum of five hundred dollars, exclusive of property exempt from execution, and over and above all his just debts and liabilities.

Subscribed and sworn to before me this 4th day of December, 1895.

IGNATZ STEINHART.
ELBRIDGE DURBROW.

[SEAL.] ALFRED A. ENQUIST,
Notary Public in and for the City and County of San Francisco, State of California.

(Endorsed:) Filed December 4, 1895. W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk.

72 In the Circuit Court of the United States of the Ninth Judicial Circuit, Northern District of California.

THE SECRETARY OF THE TREASURY, Petitioner and Appellee,
vs.
THE ANGLO-CALIFORNIAN BANK (LIMITED), Respondent and Appellant. } No. 12070.

Clerk's Certificate to Transcript.

In the matter of the petition of the Secretary of the Treasury for review of a decision of the board of United States general appraisers relative to certain twenty steel rails.

I, W. J. Costigan, clerk of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, do hereby certify the foregoing seventy (70) pages, numbered from 1 to 70 inclusive, to be a full, true and cor-

rect copy of the record and proceedings in the above and therein entitled matter, and that the same together constitute the transcript of the record herein, upon appeal to the United States circuit court of appeals, for the ninth circuit.

I further certify that the cost of the foregoing transcript of record is $42.70, and that the said amount was paid by the Anglo-Californian Bank, Limited, appellant.

73 In testimony whereof, I have hereunto set my hand and affixed the seal of said circuit court this 2d day of January, A. D. 1896.

[SEAL.]

W. J. COSTIGAN,
Clerk United States Circuit Court,
Northern District of California.

THE UNITED STATES OF AMERICA:

In the Circuit Court of the United States of America, Ninth Circuit, in and for the Northern District of California.

In the Matter of THE SECRETARY OF THE TREASURY, Petitioner and Appellee, *vs.* THE ANGLO-CALIFORNIAN BANK, LIMITED, Respondent and Appellant. } Citation. No. 12070.

Citation.

To John G. Carlisle, Secretary of the Treasury, Greeting:

Whereas, The Anglo-Californian Bank, Limited, respondent and appellant above named, has lately appealed to the circuit court of appeals of the United States, ninth circuit, from the judgment and decision lately rendered in the circuit court of the United States for the northern district of *the United States*, made in favor of you, Secretary of Treasury, and has filed the security required by law, you are therefore hereby cited and admonished to be and appear before the said circuit court of appeals at the city and county

74 of San Francisco, State of California, on the 3d day of January, A. D. 1896, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city and county of San Francisco in the said ninth circuit this 4th day of December in the year of our Lord one thousand eight hundred and ninety-five.

JOSEPH McKENNA,
Judge of the Circuit Court of the United States
in and for the Northern District of California.

(Endorsed:) No. 12070. Citation. Due service of within citation admitted this 4th day of December, 1895. H. S. Foote, U. S. att'y and attorney for appellee. Filed December 4, 1895. W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk.

(Endorsed:) No. 273. United States circuit court of appeals for

the ninth circuit. The Anglo-Californian Bank, Limited, appellant, *vs.* The Secretary of the Treasury, petitioner, etc., appellee. In the matter of the petition of the Secretary of the Treasury for review of a decision of the board of United States general appraisers relating to certain twenty steel rails. Transcript of appeal. From the circuit court of the United States of America, for the ninth judicial circuit, in and for the northern district of California. Filed January 2, 1896. F. D. Monckton, clerk.

75 At a stated term, to wit, the October term, A. D. 1895, of the United States circuit court of appeals for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Friday, the fourteenth day of February, in the year of our Lord one thousand eight hundred and ninety-six.

Present: The Honorable William B. Gilbert, circuit judge; Honorable Erskine M. Ross, circuit judge; Honorable Thomas P. Hawley, district judge.

THE ANGLO-CALIFORNIAN BANK, LIMITED, Appellant,
vs.
THE SECRETARY OF THE TREASURY, Petitioner, etc., Appellee. } No. 273.

Ordered appeal argued by Charles A. Garter, Esq., counsel for the appellant, and Samuel Knight, Esq., assistant United States attorney, and submitted to the court for its consideration and decision, the appellant being allowed ten days to file a reply brief.

76 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE ANGLO-CALIFORNIAN BANK, LIMITED, Appellant,
vs.
THE SECRETARY OF THE TREASURY, Petitioner, etc., Appellee. } No. 273.

In the matter of the petition and application of the Secretary of the Treasury for a review, under an act of Congress approved June 10, 1890, entitled "An act to simplify the laws in relation to the collection of revenues," of the questions of law and fact involved in a decision of the board of general appraisers on duty at the port of New York in the matter of the classification of certain (T) steel rails, merchandise imported by the Bank of California of San Francisco, California, into the port of San Francisco, the subsequent liquidation of duties whereon was protested by the Anglo-Californian Bank, Limited, at the same place.

Appeal from the circuit court of the United States for the northern district of California.

The board of general appraisers sustained the protest of the Anglo-Californian bank against the decision of the collector of customs at San Francisco. The circuit court reversed the decision of

the appraisers. The material facts upon which the matter in issue was tried are stated in the opinion of the appraisers and of the circuit court to be as follows: "The Bank of California, at various times between March 2 and June 24, 1887, imported into the port of San Francisco certain (T) steel rails, aggregating 5,678 tons. These rails remained in general order unclaimed until February 27, 1888, when warehouse entries thereof were made and bonds given by the Bank of California as importer and consignee. Said warehouse entries were liquidated, under the act of March 3, 1883, at $17 per ton, and at the expiration of one year from the date of the importation the additional duty of 10 per cent. prescribed by section 2970,
77 Revised Statutes, was charged upon the bonds against the merchandise. Between September 21, 1888, and December 6, 1889, four withdrawals for consumption were made and the amount of duties charged thereon was paid. When the bonded period of three years was about to expire the Oregon Pacific Railroad Company, for whose account the steel rails in question had been imported, represented to the Treasury Department that serious casualties had occurred to its roads by storms and floods, and requested a postponement of the sale of merchandise required under section 2971, Revised Statutes; whereupon the Secretary of the Treasury authorized a postponement of the sale for three months without giving due notice to or having the consent of the principal or sureties on the warehouse bonds. Similar postponements have been allowed for periods of six months up to the present date, the Bank of California uniting in two instances in the application for delay. A postponement of the sale of the merchandise allowed by the Secretary of the Treasury September 16, 1893, was conditioned upon the consent of the sureties on the bond. The final postponement was authorized by the Secretary of the Treasury March 25, 1895, pending decision regarding the legal status of the goods by the board of general appraisers. Under date of June 30, 1890, more than three years after the date of importation, the Secretary of the Treasury authorized the collector at San Francisco to permit withdrawals for consumption of the steel rails in question from time to time in such quantities as might be desired. On October 21, 1890, the Treasury Department decided that withdrawals might be made under the act of 1890 by the importers at the rates of duty, regular and additional, prescribed by the act of 1883. Notwithstanding this decision 3,306 tons of steel rails were withdrawn for consumption, and in addition to 10 per cent., as prescribed by section 2970, Revised Statutes,
78 duties were paid thereon and accepted by the collector at $13.44 per ton, the rate prescribed therefor in act of October 1, 1890. All charges and expenses, including storage charges, have been paid. The importers recently offered to withdraw for consumption the remainder of the merchandise in bonded warehouse at the rate prescribed in paragraph 117 of the act of August 1, 1894. Permission to make such withdrawals has not been granted by the Secretary of the Treasury, but in lieu thereof authority has been given the collector to permit withdrawal entry to be made by

the importers of a small portion of the merchandise at the rates prescribed in the act of March 3, 1883, in order that a test case for judicial decision might be made. In accordance with the authority thus granted, entry for consumption of twenty of the steel rails in question (weighing about 5 tons) was made by the importers, and duty was assessed thereon by the collector at $17 per ton and 10 per cent. additional under the act of March 3, 1883, the act in force at the time the merchandise was imported. Against this action the importers protested, claiming that the merchandise in question, having been withdrawn for consumption after August, 1894, was properly dutiable at seven-twentieths of 1 cent per pound, in accordance with the provisions of section 1 and paragraph 117 of the present act."

Upon these facts the questions presented involve a construction of certain sections of the Revised Statutes of the United States; of the act of June 10, 1890, to simplify the laws in relation to the collection of the revenue (26 Stat., 131, 142), known as the administrative act; of the act of October 1, 1890, to reduce the revenue and equalize duties on imports, and for other purposes (26 Stat., 567, 625), known as the McKinley act, and of the act of August 28, 1894, to reduce taxation, to provide revenue for the Government, and for other purposes (28 Stat., 509, 570), known as the Wilson act. The sections of the statutes read as follows:

79

Revised Statutes.

"SEC. 2970. Any merchandise deposited in bond in any public or private bonded warehouse may be withdrawn for consumption within one year from the date of original importation on payment of the duties and charges to which it may be subject by law at the time of such withdrawal; and after the expiration of one year from the date of original importation, and until the expiration of three years from such date, any merchandise in bond may be withdrawn for consumption on payment of the duties assessed on the original entry and charges, and an additional duty of ten per centum of the amount of such duties and charges."

"SEC. 2971. All merchandise which may be deposited in public store or bonded warehouse may be withdrawn by the owner for exportation to foreign countries; or may be transshipped to any port of the Pacific or western coast of the United States at any time before the expiration of three years from the date of original importation; such goods on arrival at a Pacific or western port to be subject to the same rules and regulations as if originally imported there. Any goods remaining in public store or bonded warehouse beyond three years shall be regarded as abandoned to the Government, and sold under such regulations as the Secretary of the Treasury may prescribe, and the proceeds paid into the Treasury. In computing this period of three years, if such exportation or transshipment of any merchandise shall, either for the whole or any part of the term of three years, have been prevented by reason of any order of the President, the time during which such exportation or

transshipment of such merchandise shall have been so prevented shall be excluded from the computation. Merchandise withdrawn for exportation shall be subject only to the payment of such storage and charges as may be due thereon."

"SEC. 2972. The Secretary of the Treasury, in case of any sale of any merchandise remaining in public store or bonded warehouse beyond three years, may pay to the owner, consignee, or agent of such merchandise, the proceeds thereof, after deducting duties, charges, and expenses in conformity with the provision relating to the sale of merchandise remaining in a warehouse for more than one year."

"SEC. 2973. If any merchandise shall remain in public store beyond one year, without payment of the duties and charges thereon, except as hereinbefore provided, then such merchandise shall be appraised by the appraisers, if there be any at such port * * * and sold by the collector at public auction, on due public notice thereof being first given, in the manner and for the time to be prescribed by a general regulation of the Treasury Department. At such public sale, distinct printed catalogues descriptive of such merchandise, with the appraised value affixed thereto, shall be distributed among the persons present at such sale. A reasonable opportunity shall be given before such sale, to persons desirous of purchasing, to inspect the quality of such merchandise. The proceeds of such sales, after deducting the usual rate of storage at the port in question, with all other charges and expenses, including duties, shall be paid over to the owner, importer, consignee, or agent and proper receipts taken for the same."

Administrative Act.

"SEC. 20. Any merchandise deposited in any public or private bonded warehouse may be withdrawn for consumption within three years from the date of the original importation, on payment of the duties and charges to which it may be subject by law at the time of such withdrawal: Provided, that nothing herein shall affect or impair existing provisions of law in regard to the disposal of perishable or explosive articles."

Section 29, after enumerating several sections of the Revised Statutes (sections 2970, 2971, 2972, and 2973 not being mentioned) and repealing them in direct terms, reads as follows: "And all other acts and parts of acts inconsistent with the provisions of this act, are hereby repealed, but the repeal of existing laws or modifications thereof embraced in this act shall not affect any act done, or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause before the said repeal or modification; but all rights and liabilities under said laws shall continue and may be enforced in the same manner as if said repeal or modifications had not been made." * * *

McKinley Act.

The enacting clause reads as follows: "That on and after the sixth day of October, eighteen hundred and ninety, unless otherwise specially provided for in this act, there shall be levied, collected and paid upon all articles imported from foreign countries, and mentioned in the schedules herein contained, the rates of duty which are, by the schedules and paragraphs, respectively prescribed, namely:

"Schedule C, paragraph 141. Railway bars, made of iron or steel, and railway bars made in part of steel, T rails, and punched iron or steel flat rails, six-tenths of one cent per pound."

Sections 50, 54, and 55 of this act read as follows:

"SEC. 50. That on and after the day when this act shall go into effect all goods, wares, and merchandise previously imported, for which no entry has been made, and all goods, wares, and merchandise previously entered without payment of duty and under bond
82 for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been issued, shall be subjected to no other duty upon the entry or the withdrawal thereof than if the same were imported respectively after that day: Provided, that any imported merchandise deposited in bond in any public or private bonded warehouse having been so deposited prior to the first day of October, eighteen hundred and ninety, may be withdrawn for consumption at any time prior to February first, eighteen hundred and ninety-one, upon the payment of duties at the rates in force prior to the passage of this act: Provided further, that when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse said duties shall be levied and collected upon the weight of such merchandise at the time of its withdrawal."

"SEC. 54. That section twenty of the act entitled 'An act to simplify the laws in relation to the collection of revenues;' approved June 10th, eighteen hundred and ninety, is hereby amended to read as follows: 'Sec. 20. That any merchandise deposited in bond in any public or private bonded warehouse may be withdrawn for consumption within three years from the date of original importation, on payment of the duties and charges to which it may be subject by law at the time of such withdrawal: Provided, that nothing herein shall affect or impair existing provisions of law in regard to the disposal of perishable or explosive articles.'"

"SEC. 55. That all laws and parts of laws inconsistent with this act are hereby repealed: Provided, however, that the repeal of existing laws, or modifications thereof, embraced in this act shall not affect any act done or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause before the
83 said repeal or modifications, but all rights and liabilities under said laws shall continue and may be enforced in the same manner as if said repeal or modification had not been made."

Wilson Act.

The enacting clause is, "That on and after the first day of August, eighteen hundred and ninety-four, unless otherwise specially provided for in this act, there shall be levied, collected and paid upon all articles imported from foreign countries or withdrawn for consumption, and mentioned in the schedules herein contained, the rates of duty which are by the schedules and paragraphs respectively prescribed, namely:

"Schedule C, paragraph 117.—Railway bars, made of iron or steel, and railway bars made in part of steel, T rails, and punched iron or steel flat rails seven-twentieths of one cent per pound." (Which computed upon the basis of 2,240 pounds to the ton would be $7.84 per ton.)

SEC. 72. "All acts and parts of acts inconsistent with the provisions of this act are hereby repealed, but the repeal of existing laws or modifications thereof embraced in this act shall not affect any act done, or any right accruing or accrued or any suit or proceeding had or commenced in any civil cause before the said repeal or modifications; but all rights and liabilities under said laws shall continue and may be enforced in the same manner as if said repeal or modifications had not been made." * * *

Section 10 of the act of March 3, 1883 (22 Stat., 525), to which reference will be made, reads as follows:

"That all imported goods, wares, and merchandise which may be in the public stores or bonded warehouses on the day and year when this act shall go into effect, except as otherwise provided in
84 this act, shall be subjected to no other duty upon the entry thereof for consumption than if the same were imported respectively after that day; and all goods, wares, and merchandise remaining in bonded warehouses on the day and year this act shall take effect, and upon which the duties shall have been paid, shall be entitled to a refund of the difference between the amount of duties paid and the amount of duties said goods, wares, and merchandise would be subject to if the same were imported respectively after that date."

Chas. A. Garter, Jesse W. Lilienthal, and J. F. Evans, for appellant; H. S. Foote, U. S. attorney, and Samuel Knight, assistant U. S. attorney, for appellee.

Before Gilbert and Ross, circuit judges, and Hawley, district judge.

HAWLEY, *District Judge:*

The contention of appellant, upon the foregoing state of facts and the various provisions of the statutes relating thereto, is to the effect that when the McKinley act went into operation the specific rate of duty upon steel rails was changed from $17 per ton to $13.44; that this rate was again changed by the Wilson act to $7.84; that section 2970 of the Revised Statutes has been repealed and is, therefore, inapplicable to the merchandise in controversy in this proceeding;

that the words "shall be regarded as abandoned to the Government," used in section 2971, were repealed by the later sections of the Revised Statutes, and have been so treated by the regulations and practice of the Treasury Department.

The contention of the appellee is that at the expiration of three years from the date of the original importation the merchandise in question became abandoned to the United States and was
85 subject to sale as such to satisfy the duties and charges thereon then in force, to wit, the duty of $17 a ton under paragragh 147 of the tariff act of March 3, 1883, and ten per cent. additional thereon, with warehouse charges, under section 2970 of the Revised Statutes; that this right to sell the merchandise and to deduct from the proceeds thereof the duties and charges as above mentioned was a right accrued at such time to the United States and a liability incurred by said merchandise and the importer thereof, within the meaning of section 29 of the administrative act of June 10, 1890; section 55 of the McKinley act of October 1, 1890, and section 72 of the Wilson act of August 28, 1894; that section 2971 of the Revised Statutes was not repealed nor in any manner modified by the administrative act, nor by the McKinley act, nor by the Wilson act, but ever has been since its enactment in full force and effect, save as modified by section 2972, and that it therefore necessarily follows that the duties and charges properly assessed against the steel rails and collected from the proceeds of the sale thereof or from the importer thereof by the collector of customs are those in force at the time of their abandonment.

Which contention is correct?

The questions involved in this case have been argued with marked ability upon both sides. The authorities bearing upon the questions have been collected and discussed at length. The various acts of Congress have been thoroughly reviewed and our attention has been called to the entire system of tariff legislation.

The contention of appellant is sustained by the decision of the Court of Claims in Abbott *v.* United States, 20 Court of Claims, 280. The contention of appellee is sustained by the views expressed
86 by Attorney General Brewster (17 Att'y Gen. Op., 650), and Attorney General Olney, January 17, 1895. Owing to these conflicting opinions the contest in the present case is presented with the evident purpose of having the questions authoritatively settled.

In the outset it will be conceded that revenue statutes are enacted under the general power of the Government to impose a tax; that in order to sustain the tax in any given case it must affirmatively appear that the power to impose it comes within the letter and spirit of the law authorizing it; that if there are any doubts upon the question the construction should be in favor of the importer. Mr. Justice Story, in Adams *v.* Bancroft, 3 Sum., 384; 1 Fed. Cases, No. 44, p. 84, said "that laws imposing duties are never construed beyond the natural import of the language, and duties are never imposed upon the citizens upon doubtful interpretations, for every duty imposes a burden on the public at large, and is construed strictly, and must be made out in a clear and determinate manner

from the language of the statute." The same rule has been expressed by the Supreme Court. Hartranft *v.* Wiegmann, 121 U. S., 609, 616, and authorities there cited. The same learned justice in the earlier case of United States *v.* Breed, 1 Sum., 159: 24 Fed. Cases, p. 1222, laid down the rule as to the proper construction to be given to such acts as follows: "Revenue and duty acts are not in the sense of the law penal acts, and are not, therefore, to be construed strictly; nor are they, on the other hand, acts in furtherance of private rights and liberty, or remedial, and therefore to be construed with extraordinary liberality. They are to be construed according to the true import and meaning of their terms, and when the legislative intention is ascertained, that, and that only, is to be our guide in interpreting them."

Such laws are more remedial than penal in their nature.
87 They are intended to prevent fraud, to suppress public wrong, and to promote the public good, and should always be so construed as to effectually carry out the purposes and objects which they were intended to accomplish. Taylor *v.* United States, 3 How., 197; Cliquot's Champagne, 3 Wall., 115; United States *v.* Hodson, 10 Wall, 395; Smythe *v.* Fiske, 23 Wall., 374, 380.

The steel rails in question were imported in 1887 and entered for warehousing February 27, 1888, and the duties liquidated under the act of 1883. At that time the rights and liabilities of the importers were clear and plain. They had the right to withdraw the rails within one year by paying the duties then existing, viz., $17 per ton, or they might, after the expiration of one year and within three years, withdraw the rails upon paying the duty of $17 per ton and 10 per cent. additional duty. (Rev. Stat., 2970.)

Upon this point there can be no controversy; but the rails in question were not withdrawn until after the expiration of the three years, and hence, under the terms of section 2971, were to be "regarded as abandoned to the Government;" but this right of the Government was not enforced because the Oregon Pacific railroad, for whose account the rails were imported, requested a postponement of the sale for three months on account of serious casualties that had occurred to its railroad. Other postponements were for like reasons made for periods of six months, and in the meantime the tariff acts, designated as the McKinley act and the Wilson act, were passed.

Admitting at the threshold of the discussion that the word "abandonment," when first used in the act of August 5, 1861 (12 Stat., p. 294, sec. 5), and repeated in the act of July 14, 1862 (12 Stat., p. 560, sec. 21), during the existence of war, was then used in the broad sense of divesting the importer or
88 owner of any title or interest in the goods, it does not necessarily follow that the same interpretation is to be given to it in the provisions of section 2971. The fact is that by the act of July 28, 1886 (14 Stat., p. 330, sec. 10), the provisions of the act of August 6, 1846, were re-enacted, so that thereafter the law provided that after the sale of the merchandise the excess, after deducting storage, expenses, and duties, etc., should be paid to the owner. The

various provisions of the existing laws were thereafter incorporated into the provisions of the Revised Statutes. It therefore follows that the word abandonment, as used in section 2971 in connection with the provisions contained in section 2972, is not to be construed as an absolute abandonment of the goods so as to vest the title thereof in the Government; but the word is used in the sense of vesting absolute authority and power in the Government when the goods have remained in the warehouse for a period of more than three years to sell and dispose of the same for the purpose of collecting the duties, charges, and expenses thereon. This, as we shall have occasion hereafter to state, might be accomplished by a regulation of the department allowing the goods to be withdrawn by the owner upon payment of such duties, etc.

Without repeating the respective arguments of counsel in their review of the tariff legislation, the policy of the Government in the collection of revenue duties on imported goods, and the rights of the importers to withdraw from bonded warehouses imported merchandise therein stored, we are of opinion that, after an extended examination thereof, it may safely be said that throughout the entire legislation of this country upon the subject the intent of Congress to limit the right of the importer to withdraw his goods within a certain time and to impose
89 condition for his failure so to do is made manifest. If there were no provisions in the statute for the sale of the goods by the Government, it will readily be seen, as was said by Brown, J., in United States *v.* Visser, 10 Fed., 642, 649, that "the time for the payment of duties on all warehouse goods would be practically considerably enlarged, since payment of duties could always be safely deferred until the Government was ready to effect a sale. To avoid this practical extension of the period for payment of duties and to secure prompt payment within the time intended to be limited by the warehouse acts, some provision of this kind was necessary. Moreover, the handling of the vast amount of warehoused goods, the orderly collection of the duties upon them through the proper subordinate officers, and the necessity of a transfer of the goods to different hands for the purpose of a Government sale—in other words, the conveniences of the public business—also required that a period be fixed when the importer's right to pay the duties and to control the goods should cease and when the Government might proceed to sell without inconvenience and without question. The various acts passed since the adoption of the warehouse system show, I think, that the purpose of the statute in question was not only for convenience in the transaction of the public business, but especially, also, to secure the prompt payment of duties within the prescribed period."

The argument of appellant that the action of the Secretary of the Treasury in authorizing the various postponements of the sale of the rails had the effect to nullify the provisions of section 2971 with reference to the abandonment of merchandise remaining in the bonded warehouse beyond the period of three years ought not to be sustained. It is true that under the revenue laws the Secretary of

the Treasury, in the collection of the revenues, is invested
90 with much discretion in the exercise of his administrative functions. He has the power to prescribe rules and regulations as to the modes of collection, etc., but he cannot, in the exercise of this power, alter or amend the provisions of the revenue laws. "All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted." Morrill *v.* Jones, 106 U. S., 467; Campbell *v.* United States, 107 U. S., 407, 410.

The regulations as made by the Secretary of the Treasury cannot, of course, control the courts in the construction of the revenue laws when their meaning is plain, yet if there has been a long acquiescence in such regulations and the rights of parties have been adjusted in accordance therewith the courts ought not to take a different view "without the most cogent and persuasive reasons." Brown *v.* United States, 113 U. S., 571; United States *v.* Hill, 120 U. S., 170, 182; Robertson *v.* Downing, 127 U. S., 607, 613.

The action of the Secretary of the Treasury in postponing the sale of the merchandise after the expiration of three years did not have the effect of giving the importers any new privilege or right or release them from any liability which existed by law.

The regulation of the Treasury Department of February 27, 1884, that "within the three years during which goods remaining in bonded warehouse may be withdrawn collectors of customs will notify the parties concerned of the date on which the period limited by law will expire; after such date and at any time before the goods are listed for sale the collector may allow a withdrawal entry for consumption, to be made on payment of all charges and expenses, and the duties, regular and additional, which may have accrued," is consistent with the provisions of sections 2191 and 2192 and does
not in any manner change or affect the rate of duty and the
91 charges and expenses to which the merchandise had become liable. It is in effect the same as if a sale of the goods had been provided for. Attorney General Brewster, in reply to the third question of the Secretary of the Treasury, as to "whether, under section 2971, Revised Statutes, goods are to be sold at the expiration of three years from the date of importation, notwithstanding the fact that duties may have been already paid thereon," said: "While I am of opinion that your third question should be answered in the affirmative, and so answer it, I deem it proper to add that I perceive no legal objection to the existing practice of your department respecting the disposition of goods which have remained in bonded warehouse beyond three years. The objects and requirements of the provisions of section 2971, last above adverted to, are in my judgment sufficiently met by that practice, whereby, in lieu of a former sale of goods, the owner, consignee, or agent is permitted to pay the duties, charges, etc., that have accrued thereon and take them away. In case of a sale the owner, consignee, or agent of the merchandise would (under section 2972) become entitled to receive the proceeds after deducting therefrom the duties, charges, and expenses. The practice referred to accomplishes the same end and is

indeed a virtual sale of the goods under the power given the Secretary of the Treasury by the statute."

The act of the Secretary of the Treasury in allowing the withdrawal of the rails in this case is not inconsistent with the provisions of section 2971 with reference to the abandonment of the merchandise. The Secretary, in his letter to the collector of customs allowing the withdrawal, expressly stated that a reference to the decision of the department for a long series of years shows that it has uniformly held that the duties found due on the warehouse bond at the date of its expiration became a debt collectable
92 from the proceeds of a sale of the goods or from the sureties on the bond, and that subsequent changes of tariff can neither increase nor decrease the amount of such debt. The letter further stated that the department was not disposed to inflict unnecessary hardship upon the importers by a summary closure of the matter, and, while denying the right of the importers to withdraw the goods unless the duty assessed under the act of March 3, 1883, was paid, permitted them to withdraw a small portion at that rate, and the object of this is stated as follows: "It may be that duties will be so paid under protest in order that the exaction of duty may be reviewed by the board of general appraisers. Should this prove to be the case, you are further authorized to delay the sale of the remaining property until a decision has been reached."

Surely the importers cannot claim that they were released from any existing liability by reason of this extended favor. The withdrawal of a small portion of the goods was allowed in order to test, not to create, the liability of the importers and the rights of the Government in the premises.

The case of Abbott & Co. *v.* United States, 20 Court of Claims, 280, decided April 27, 1885, is cited in support of, and is conceded to be an authority in favor of, the position contended for by appellant. In that case the claimants were, on July 1, 1883, the owners of 66,575 pounds of wool lying in the United States bonded warehouse at Boston. The wool was imported from England March 8, 1880, and placed in the warehouse, where it remained until August 31, 1883. It was then removed by the claimants. The duties were paid March 7, 1881. The claimants made a demand upon the collector of the port for $665.75, a sum equal to a difference between the duties that had been levied and paid and the duty to which the wool was subject under the tariff act of March 3, 1883, and the
93 court held that the claimants were entitled to the refund. The court, after quoting section 10 of the act of 1883, said: "The language of this section, so far as it relates to goods upon which the duties had been paid, is very general. Taken by itself, it fully sustains the claimants' demand, for their goods were in bonded warehouse when the act went into effect and the duties had been paid. The defendants, however, contend that the claimants can derive no benefit from this section, because their goods, having been in the bonded warehouse for more than three years, were abandoned to the Government under section 2971, Revised Statutes. This section provides that 'any goods remaining in public store or bonded

warehouse beyond three years shall be regarded as abandoned to the Government and sold under such regulations as the Secretary of the Treasury may prescribe.' Standing by itself, this section might support the defendants' position. It implies that the title of the original owners, by lapse of time and operation of law, has become divested and the Government has succeeded to the ownership. The original act, July 14, 1862 (12 Stat. L., p. 560), from which this section is taken, was based upon that theory, and so it provided that the proceeds of sale should be paid into the Treasury. The character of this provision and purpose of the Government have been entirely changed by the act, July 28, 1866 (14 Stat. L., p. 330), now section 2972, which provides that 'the Secretary of the Treasury may pay to the owner, consignee, or agent of such merchandise the proceeds thereof after deducting duties, charges, and expenses.' Since this enactment the goods are no longer to be regarded as abandoned by the owner to the Government. The ownership continues without change, but after the sale attaches to the net proceeds instead of the goods. The two sections construed together provide a mode
for the collection of duties and charges and the clearance
94 of the warehouses. When the goods have remained in bond more than three years the Government acquires a right to sell them for the purpose named, but cannot pocket the proceeds. Hence the practice has arisen in the Treasury Department to allow the owner, at any time before the goods are advertised for sale, to remove the same upon the payment of duties and charges." After quoting with approval the views of Attorney General Brewster as to the practice of the department allowing the owner to withdraw the goods upon the payment of duties — further said: "Apparently Congress intended that all goods remaining in the bonded warehouse July 1, 1883, and which, according to the construction and practice of the department under sections 2971 and 2972, might be withdrawn by the consignee upon payment of duties and charges, should go upon the market with no heavier burdens than were to be imposed, under the new tariff, upon later importations." In so far as this opinion declares that the provisions of section 2971 *has* been changed by section 2972 so as to allow the importer to remove the goods after they have been in the bonded warehouse beyond the period of three years, "upon the payment of duties and charges," it is not opposed to the views we have expressed. The claimants in the present case were allowed to withdraw the goods in question upon payment of the duties and charges demanded by the collector. The question is, What amount of duty were the goods subject to?

The court in the Abbott case seemed to be of opinion that because of the provisions in section 2972 and the practice of the department in allowing the goods to be withdrawn it was the intention of Congress that the goods "should go upon the market with no heavier burdens than were to be imposed under the new tariff upon later
importations." In this respect we decline to accept the con-
95 clusions reached by the Court of Claims. The opinion is entitled to and has received respectful consideration, but it is

not of controlling authority and ought not to be followed unless its reasoning and conclusion are deemed to be correct.

The case of *In re* Schmid, 54 Fed., 145, cited and relied upon by appellant, is different in its facts from the case at bar in this, that the goods in question in that case had not been in bond for a period of three years, and hence did not come within the provisions of section 2971.

Is section 2971 repealed by the subsequent tariff acts?

We have already quoted at length in the statement of facts the various sections and provisions of the laws which are relied upon by appellant to sustain his contention. They need not be again repeated in full. Section 29 of the administrative act repealed in direct terms several sections of the Revised Statutes, but among them section 2971 is not mentioned. It was not in direct terms repealed. The same section of the act also repealed "all other acts and parts of acts inconsistent" with its provisions, with a saving clause that such repeal or modification of the existing laws "shall not affect any act done or any right accruing or accrued, * * * but all rights and liabilities under said laws shall continue and may be enforced in the same manner as if said repeal or modifications had not been made."

Section 55 of the McKinley act of October 1, 1890, and section 72 of the Wilson act of August 28, 1894, contain the same provisions.

Conceding that section 2970 has been repealed, the question still remains, Is section 2971 inconsistent with or repugnant to any of the provisions contained in the acts above mentioned?

It must be conceded that in order to constitute a repeal of the law upon such grounds there must be a positive repugnancy
96 between the old laws and the new one. This principle is elementary. In no line of cases has this rule been adhered to with greater strictness than in the interpretation of laws enacted for the collection of the revenues.

In Wood *v.* United States, 16 Pet., 342, 362, the question was presented to the court whether the 66th section of the act of 1799 had been repealed or whether it remained in full force. That section of the act, like the one under consideration here, had not been expressly or by direct terms repealed, and the court said: "The question then arises whether the 66th section of the act of 1799, c. 128, has been repealed or whether it remains in full force. That it has not been expressly or by direct terms repealed is admitted, and the question resolves itself into the more narrow inquiry whether it has been repealed by necessary implication. We say by necessary implication, for it is not sufficient to establish that subsequent laws cover some or even all of the cases provided for by it, for they may be merely affirmative or cumulative or auxiliary; but there must be a positive repugnancy between the provisions of the new law and those of the old, and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy; and it may be added that in the interpretation of all laws for the collection of revenue, whose provisions are often very complicated and numer-

ous to guard against frauds by importers, it would be a strong ground to assert that the main provisions of any such laws sedulously introduced to meet the case of a palpable fraud should be deemed repealed merely because in subsequent laws other powers and authorities are given to the custom-house officers and other modes of proceeding are allowed to be had by them before the goods have passed from their custody in order to ascertain whether there has been any fraud attempted upon the Government. The
97 more natural, if not the necessary, inference in all such cases is that the legislature intend the new laws to be auxiliary to and in aid of the purposes of the old law, even when some of the cases provided for may equally be within the reach of each. There certainly, under such circumstances, ought to be a manifest and total repugnancy in the provisions to lead to the conclusion that the latter laws abrogated and were designed to abrogate the former." See also Aldridge *v.* Williams, 3 How., 1, 25; The Distilled Spirits, 11 Wall., 356, 365; Fabri *v.* Murphy, 95 U. S., 191, 196.

In Fabri *v.* Murphy the question was whether the merchandise was subject to the additional duty of ten per cent. imposed by the act of March 14, 1866 (14 Stat., 8). The goods were imported in November, 1869, and were stored in the bonded warehouse until March 20, 1871, when they were withdrawn for consumption. The court held that the goods were subject to the additional duty of ten per cent. imposed by the act of 1866. In discussing certain acts relating to the revenue the court said: "Acts of Congress of the kind are often very complex in their provisions in order to enable those charged with their execution to protect the Treasury against the constant attempts of importers to evade the payment of new duties or increased taxation. New regulations often become necessary to enable the officers of the custom to defeat such designs, and the rule is that in such cases there ought to be a manifest and irreconcilable repugnancy to warrant the conclusion that the old law is abrogated or that the new law was intended to supersede the antecedent provision."

In the light of these cardinal rules of construction and of the history, policy, and intention of the revenue laws, as hereinbefore discussed, we are of opinion that the provisions of section 2971
98 are not inconsistent with the various sections of the subsequent tariff acts hereinbefore referred to.

Attorney General Brewster, February 7, 1884, in reply to the question of the Secretary whether section 10 of the act of 1883 is necessarily limited to goods which had not been in bonded warehouses more than three years at the date said act went into operation, among other things, said: "That the first clause of this section, which deals with imports whereon the duties have not been paid, applies only to such merchandise remaining in the public stores or bonded warehouses on the day the act takes effect as may then lawfully be entered for consumption is indicated by the words 'upon entry thereof for consumption' used therein. These words plainly show that the benefits of the provision were meant for merchandise

in bond, which, at the time mentioned, the importer is entitled thus to enter, and for none other. * * * Thus, by the then and still existing law, goods in bond can be entered for consumption and withdrawn at any time during the period of three years from the date of original importation. Upon the expiration of this period, however, the privilege so to enter such goods ceases, and (by section 2971, Revised Statutes) they are to be 'regarded as abandoned to the Government and sold under such regulations as the Secretary of the Treasury may prescribe,' etc. It follows that merchandise whereon the duties have not paid, which had been in the public stores or bonded warehouses more than three years on the day the act of 1883 took effect, does not come within the operation of section 10 of that act. * * * Under section 2977, Revised Statutes, merchandise upon which duties have been paid may thereafter remain in bonded warehouse in custody of the customs officers at the expense and risk of the owners; but the period during which it may thus remain subject to withdrawal by him is limited, for unless withdrawn for consumption or exportation within three years
99 from the date of original importation it becomes liable to be sold as abandoned to the Government (sec. 2971, Rev. Stat.). * * * I am thus led to the conclusion that the whole of the section is inapplicable to merchandise which on the day the act of 1883 took effect had remained in bonded warehouse more than three years from the date of original importation, and were then, in contemplation of law, abandoned to the Government. In direct answer to your first question I accordingly reply that, in my opinion, section 10 of the tariff act of March 3, 1883, extends only to goods which had not been in bonded warehouse more than three years at the date that act went into operation. * * * The provision in section 2971 * * * has, I think, a double purpose. First, to enforce the collection of duties, charges, etc., upon the goods, and, second, to relieve their customs service from the care and custody thereof. * * * Yet, as already observed, the privilege thereby conferred of letting the goods remain in warehouse in custody of the custom officers after payment of the duties thereon is subject to the limitation of three years from the date of original importation under the operation of the above-mentioned provision in section 2971. At the end of that period they are to be regarded as abandoned to the Government and sold."

If section 2971 is consistent with the provisions of section 10 of the act of 1883, how can it consistently be said that it is repugnant to the section of the McKinley or Wilson acts which we have cited. The preamble in the tariff acts must be read in the light of what is contained in other parts of the laws, especially of the provisions of section 29 of the administrative act, section 55 of the McKinley act, and section 72 of the Wilson act, to the effect that the repeal of existing laws or modifications shall not affect any act done "or any right accruing or accrued," etc. The merchan-
100 dise in question, having remained in the bonded warehouse for a period of more than three years on the 24th of June, 1890, became, under the laws then existing and in full force,

subject to the duty provided in the tariff act of March 3, 1883, and ten per cent. additional thereon, with warehouse charges as prescribed by law. This was a right that had accrued to the Government prior to the passage of the McKinley or Wilson tariff acts. In United States *v.* Burr, 159 U. S., 78, the court held that goods arriving at the port of New York August 7, 1894, entered at the custom-house, and duties paid August 8, 1894, and the entry liquidated as entered at the custom-house August 28, 1894, on which day the tariff act of August, 1894, became a law, were subject to duty under the act of October 1, 1890, and not to duty under the act of August 28, 1894. The court, in the course of its opinion, after quoting in full section 72 of the Wilson act and the provisions of section 54 of the McKinley act, said: "This merchandise was entered for consumption and delivered after August 1 and before August 28, 1894, when the act in question became a law. It was subject then to the rates of duty imposed by the law in force at that time, namely, the act of October 1, 1890, and the duties were properly assessed by the collector under that law, unless some provision to the contrary is to be found in the act of August 28, 1894." After quoting the preamble in the first section of the act of 1894, the court continues: "The contention is that, the language of that section being free from all obscurity and ambiguity, there is no room for construction, and that the court is imperatively required to conclude that it was the intention of Congress that the act should have a retrospective operation as of August 1, 1894, although it did not become a law until after that date. It is conceded that the general rule is, as stated in United States *v.* Heth, 3 Cranch, 398, 413, that 'words in a statute
101 ought not to have a retrospective application unless they are so clear, strong, and imperative that no other meaning can be annexed to them or unless the intention of the legislature cannot be otherwise satisfied,' and that the usual course in tariff legislation has been, inasmuch as some time is necessary to enable importers and business men to act understandingly, to fix a future date at which the statutes are to become operative. The question is not one of construction, but of intention as to the operative effect of this act because of the existence of the particular date in section 1. In view of the general rule and the admitted policy in respect of such laws, is there anything on the face of the act which raises such a doubt in the matter as justifies the court in considering whether the language used in that particular section must be literally applied in the case before it? And upon the threshold we are met with the fact that the act of October 1, 1890, was not repealed in terms until August 28, 1894, and that the repealing section of the latter act kept in force every right and liability of the Government or of any person which had been incurred or accrued prior to the passage thereof, and thereby every such right or liability was excepted out of the effect sought to be given to the first section. The right of the Government to duties under the tariff law which existed between August 1 and August 28 was a right accruing prior to the passage of the act of 1894 (that is, the date when the bill became a law), and the obliga-

tion of the importers between August 1 and August 28 to pay the duties on their entries under existing tariff law was a liability under that law arising prior to the passage of the act of 1894, and if Congress intended that section 1 should relate back to August 1, still the intention is quite as apparent that the act of October, 1890, should remain in full force and effect until the passage of the new act on August 28, and that
102 all acts done, rights accrued, and liabilities incurred under the earlier act prior to the repeal should be saved from the effect thereof, as to all parties interested, the United States included. The duties under consideration were paid August 8, and the merchandise delivered on August 11, but it was not until August 28 that the fact was stamped on the entry that the goods were liquidated as entered. There was no change in the classification and no additional duty was demanded or collected, and the payment made at the time of entering the merchandise for consumption was the payment of duties. Barney *v.* Rickard, 157 U. S., 352. The original assessment of duty was right, and the final liquidation was the same, and there was no specific provision in the act of 1894 requiring a liquidation at the rates under that act. How, then, can it be held that the act of October 1, 1890, was intended to be repealed by retroaction? Moreover, in arriving at the true intention of Congress we cannot treat section 1 as if it constituted the entire act, but must deduce the intention from a view of the whole statute and from the material parts of it. * * * Again, a higher rate of duty was imposed on many articles by the act of 1894 than under the prior act, and a lower rate of duty on others, while some that were free were made dutiable, as, for instance, the article of sugar. Must duties paid between August 1 and August 28 be refunded where the rate was lowered and assessed where the rate was raised or a duty imposed where none existed? Clearly not. These considerations lead to the conclusion that the act ought not to be construed to operate retrospectively contrary to the general rule, and so as to turn what was intended to secure a period of time to enable business men to act understandingly under the new law into a source of confusion and mischief to the contrary. * * * And as the act of October 1, 1890, was not repealed by the act of
103 August, 1894, until the latter act became a law, when inconsistent laws were declared thereby repealed, we think it cannot be doubted that Congress intended the rates of duty prescribed by the act of 1894 to be levied on the first day of August if the bill should then be a law, and if not, then as soon after that date as it should become a law. On the first day of August the duties prescribed by the first section of the act of 1894 could not be lawfully levied, and, so far as the importations in this case are concerned and others similarly situated, the law required the exaction of the duties prescribed by the act of 1890. As to such importations the first section of the act of 1894 could not be literally carried out, unless by holding it to operate as a retroactive repeal, notwithstanding the saving clause, and this we consider altogether inadmissible. The language of section one was that on and after the first of August

there shall be levied, and of the second section that on and after the first day of August certain enumerated articles when imported shall be exempt from duty. In our judgment, the word 'shall' spoke for the future and was not intended to apply to transactions completed when the act became a law."

Appellant relies upon the words "or withdrawn for consumption," as found in the preamble of the Wilson act, to sustain the position that the rate of duties therein prescribed apply not only to merchandise thereafter imported from foreign countries, but also to merchandise that had remained in the bonded warehouse for a period of more than three years which should thereafter be "withdrawn for consumption." It may be admitted that such a construction could and should be given to the language of the preamble, if its interpretation was to be drawn from that section alone. But it is the duty of the court to examine the entire act, or at least the pro-
104 visions which have any special bearing upon the question, and also to examine the provisions of other acts which are to be construed in *pari materia* therewith. The entire revenue laws in force must not be overlooked. All acts not repealed must be taken into consideration and harmonized, if possible, so as to make a consistent whole. To give to the section in question the construction which appellant claims for it would, as we have already shown, be inconsistent with the history and general policy of the tariff legislation of this country and repugnant to various provisions of the existing revenue laws. To construe the words "withdrawn for consumption" as intended to apply to the provisions of the previous revenue acts allowing goods to be "withdrawn for consumption" within three years makes it consistent, and such, we believe, was the intention of Congress.

Attorney General Olney, in a letter dated January 17, 1895, to the Secretary of the Treasury, with reference to rates of duty chargeable on certain goods which were originally imported while the provisions of the McKinley tariff act of 1890 were still in force, but remained in the custody of the Government until after the passage of the Wilson tariff act of 1894, expressed views which we believe to be correct and directly applicable here. He said that by the express language of section 1 of the act of 1894 "the new rates apply not to all warehoused goods, as by section 50 of the act of 1890, but only to 'articles (thereafter) imported from foreign countries or withdrawn for consumption.' The latter clause should be construed with the prior legislation above quoted so as to constitute a harmonious whole. In my opinion, therefore, goods imported and entered for warehouse prior to the act of 1894, and not withdrawn
105 for consumption within three years from the date of original importation, are unaffected by the new rates of duty; and the 'duties' mentioned in section 2872 of the Revised Statutes are the duties to which they were previously subject, whatever be the construction to be put upon this section in other respects. My opinion applies not only to goods imported within three years before the act of 1894 took effect, but to all goods theretofore imported and then subject to the tariff rates of 1890."

For the reasons herein given we are of opinion that the contention of the appellee is correct.

The judgment of the circuit court is affirmed with costs.

(Endorsed:) Opinion. Filed Oct. 19, 1896. F. D. Monckton, clerk.

106 United States Circuit Court of Appeals for the Ninth Circuit, October Term, 189–.

THE ANGLO-CALIFORNIAN BANK, LIMITED, Appellant,
vs.
THE SECRETARY OF THE TREASURY, Petitioner, etc., Appellee. } No. 273.

Appeal from the circuit court of the United States for the northern district of California.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the northern district of California and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed with costs.

(Endorsed:) Decree. Filed Oct. 19, 1896. F. D. Monckton, clerk.

107 In the United States Circuit Court of Appeals in and for the Ninth Circuit.

THE ANGLO-CALIFORNIAN BANK (LIMITED), Appellant,
vs.
SECRETARY OF THE TREASURY, Appellee. } No. 273.

Petition for an Appeal to the Supreme Court of the United States.

To the judges of the United States circuit court of appeals in and for the ninth judicial circuit:

The Anglo-Californian Bank (Limited), appellant in the above-entitled suit, feeling aggrieved by the decision and decree of the United States circuit court of appeals in and for the ninth judicial circuit, affirming the decision and decree of the circuit court of the United States in and for the ninth judicial circuit and northern district of California in favor of said appellee, The Secretary of the Treasury, and against The A-glo-Californian Bank (Limited), the appellant, by the undersigned solicitors for appellant, respectfully prays, makes application for, and gives notice of an appeal to the Supreme Court of the United States, to be holden in the city of Washington, from the decision and decree of said United States circuit court of appeals given and rendered and entered on the 19th day of October, 1896, in the above-entitled suit in favor of the appellee and against said appellant.

The said appellant files herewith an assignment of errors to said decision and decree of said United States circuit court of appeals in and for the ninth judicial circuit, showing wherein said de-
108 cision and decree are erroneous and wherein and how the said appellant is aggrieved by said decision and decree of affirmance.

And said appellant prays that an appeal from said decision and decree may be allowed to it to said Supreme Court of the United States aforesaid.

THE ANGLO-CALIFORNIAN BANK
(LIMITED).
By JESSE W. LILIENTHAL.
WILSON & WILSON,
Solicitors for said Appellant.

Dated San Francisco, California, this 14th day of October, A. D. 1897.

(Endorsed:) Petition for an appeal to the Supreme Court of the United States. Rec'd this day a copy of the within petition Oct. 15, 1897. H. S. Foote, U. S. att'y. Sam'l Knight, ass't U. S. att'y. Filed Oct. 15, 1897. F. D. Monckton, clerk.

109 In the United States Circuit Court of Appeals in and for the Ninth Circuit.

THE ANGLO-CALIFORNIAN BANK (LIMITED), Appellant,
vs.
SECRETARY OF THE TREASURY, Appellee.
} No. 273.

Assignment of Errors in Support of Appeal to the Supreme Court of the United States.

The appellant, The Anglo-Californian Bank (Limited), having this day filed a petition praying that an appeal be allowed from the decision and decree of the above-entitled court affirming the decision of the circuit court of the United States in and for the ninth judicial circuit and northern district of California in favor of the appellee, The Secretary of the Treasury, and against the said appellant in the above-entitled action, assigns the following errors asserted and intended to be urged in support of its appeal:

110 I.

The court erred in affirming the decree and decision of the said circuit court reversing the decision of the board of the United States general appraisers.

II.

The court erred in affirming the decree of the said circuit court sustaining its first conclusion of law, which is as follows, to wit:

"That the merchandise involved in this controversy became abandoned to the Government within the meaning of the law and

section 2971, U. S. —, at the expiration of three years from the date of its original importation, and at the time of its withdrawal from bond, as aforesaid, such merchandise was such abandoned goods and was liable to be sold under the provisions of section- 2971, 2972, U. S. R. S."

III.

The court erred in affirming the decree of the said circuit court sustaining its second conclusion of law, which is as follows, to wit:

"That such merchandise upon its withdrawal from bond aforesaid was subject to the rates of duty in force at the time of its abandonment, as contained in the tariff act of March 3, 1883, and section 2970, U. S. R. S., regardless of changes in tariff schedules contained in the tariff acts of October 1, 1890, and August 1, 1894, subsequent to such abandonment."

111

IV.

The court erred in affirming the decree of the said circuit court sustaining its third conclusion of law, which is as follows, to wit:

"That said rails are dutiable upon such withdrawals at the rate of $17.00 a ton, under paragraph 147 of said tariff act of March 3, 1883, and such warehouse charges as may have by law accrued thereon, together with ten per cent. of such duties and charges additional thereto, under section 2970, U. S. R. S."

V.

The court erred in affirming the decree of the said circuit court sustaining its fourth conclusion of law, which is as follows, to wit:

"That the decision of the board of U. S. general appraisers herein is reversed, and the amount of duty exacted by the collector of customs for the port of San Francisco upon the withdrawal of said merchandise from bond was lawfully exacted, and the collector of customs for the port of San Francisco should, and he is hereby directed to liquidate the withdrawal entry of said steel rails accordingly."

VI.

The court erred in affirming the decree of the circuit court sustaining the order adjudging and decreeing that the decision of the board of U. S. general appraisers should be reversed, and that the merchandise covered by the decision of the said board of

112 U. S. general appraisers should be classified for duty under act of March 3, 1883, at the rate of $17.00 per ton and 10 per centum additional thereon under sec. 2970 of the Revised Statutes of the United States.

VII.

That the decision and decree in the above-entitled matter is erroneous and against the just rights of appellant for the following reasons:

1. In that said court did not make a judgment or decree affirming the decision of the board of United States general appraisers

herein adjudging that the said merchandise should be classified for duty at seven-twentieths of one cent per pound, under paragraph 117, Schedule "C," of the tariff act of August 28, 1894, as railway bars, specially provided for therein.

2. In that said court did not hold and decide that the merchandise involved herein was legally in bonded warehouse at the time of its withdrawal for consumption, and that the Secretary of the Treasury was vested with legal authority to authorize its withdrawal for consumption.

3. In that said court held and decided that the tariff act of March 3, 1883, has not been repealed by subsequent legislation, and that section 2970 of the United States Revised Statutes has not been repealed.

113 4. In that the court erred in affirming and sustaining the decision and decree of the circuit court for the reason that the said decision and decree is not supported by the findings of fact of the court, but is against and contrary to said findings and contrary to law.

5. In that the court erred in affirming and sustaining the decision and decree of the circuit court for the reason that the said decision and decree is not supported by the findings of fact of the court, but is against and contrary to said findings and contrary to law in this: that the findings show that the merchandise involved was withdrawn for consumption on the 15th day of March, 1895—that is, after August 28, 1894—at which last-mentioned date an act of Congress entitled "An act to reduce taxation, to provide revenue for the Government, and for other purposes" went into effect and was in force at the time of said withdrawal, and the rate of duty, seven-twentieths of one cent per pound, prescribed by said last-mentioned act, applied to said merchandise.

6. The said judgment and decision is erroneous and contrary to law in that it purports to make applicable to said merchandise the rate of duty prescribed by the tariff act of March 3, 1883, and an additional duty of 10 per cent. prescribed by section 2970 of the Revised Statutes of the United States; whereas the said last-mentioned act and said section 2970 had been repealed at the time of said withdrawal for consumption and the provisions thereof did not apply to said merchandise.

114 Wherefore the said appellant, The Anglo-Californian Bank (Limited), prays that the said decision and decree of the said United States circuit court of appeals affirming and sustaining the decision and decree of the said United States circuit court be reversed.

JESSE W. LILIENTHAL,
WILSON & WILSON,
Solicitors for the Anglo-Californian Bank, Limited.

(Endorsed:) Assignment of errors in support of appeal to the Supreme Court of the United States. Rec'd this day a copy of the within assignment of errors. Oct. 15, 1897. H. S. Foote, U. S. att'y. Sam'l Knight, ass't U. S. att'y. Filed Oct. 15, 1897. F. D. Monckton, clerk.

115 In the United States Circuit Court of Appeals in and for the Ninth Circuit.

THE ANGLO-CALIFORNIAN BANK (LIMITED), Appellant,
vs.
SECRETARY OF THE TREASURY, Appellee.
} No. 273.

Order Allowing Appeal.

The Anglo-Californian Bank (Limited), the above-named appellant, having this day presented its petition for appeal from the decision and decree of the United States circuit court of appeals in and for the ninth judicial district, heretofore, to wit, on the 19th day of October, A. D. 1896, made and given and rendered in the above-entitled matter, and having at the same time filed its assignment of errors, and it satisfactorily appearing to us that the question involved is of such importance as to require a review of such decision and decree by the Supreme Court of the United States:

It is hereby ordered that such appeal be, and the same is hereby, allowed as prayed for.

That said appellant give bonds in the sum of one thousand dollars, with two sufficient sureties, conditioned to answer all damages to make its plea good and prosecute the appeal to effect, and conditioned in all respects according to law.

That thereafter, upon the filing and approval of said bond, a transcript of records, proceedings, and papers upon which the
116 decree and decision herein was rendered, duly authenticated, be sent to the Supreme Court of the United States.

WILLIAM B. GILBERT, *Judge.*
WILLIAM W. MORROW, *Judge.*

(Endorsed:) Order allowing appeal. Filed Oct. 16, 1897. F. D. Monckton, clerk.

117 Know all men by these presents that we, The Anglo-Californian Bank (Limited), as principal, and Wm. M. Hoag and Wm. H. Watson, as sureties, are held and firmly bound unto the Secretary of the Treasury of the United States, his successors in office and assigns, in the full and just sum of one thousand ($1,000) dollars, to be paid to the said Secretary of the Treasury of the United States, his successors in office and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 16th day of October, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas lately, at the circuit court of appeals of the United States for the ninth judicial circuit, in a suit depending in said court between The Anglo-Californian Bank, Limited, appellant, and The Secretary of the Treasury, petitioner, etc., appellee, a decision and decree was rendered against the said appellant, and the said appellant, The Anglo-Californian Bank, Limited, having obtained an

appeal to the Supreme Court of the United States and filed a copy thereof in the clerk's office of said court to reverse the decision and decree in the aforesaid matter, and a citation having been issued directed to the United States of America and the United States attorney for the northern district of California and the Secretary of the Treasury of the United States, citing and admonishing them to be and appear before the Supreme Court of the United States, to be holden at the city of Washington:

Now, the condition of the above obligation is such that if
118 the said The Anglo-Californian Bank, Limited, shall prosecute said appeal to effect and answer all damages and costs if it fail to make the said plea good, then the above obligation to be void; else to remain in full force and virtue.

THE ANGLO-CALIFORNIAN BANK, L'D,
By —— ——, *Manager.*
WM. M. HOAG.
WM. H. WATSON.

UNITED STATES OF AMERICA, }
Northern District of California, } ss:

Wm. M. Hoag and Wm. H. Watson, being duly sworn, each for himself deposes and says that he is a householder in said district and is worth the sum of one thousand dollars, exclusive of property exempt from execution and over and above all debts and liabilities.

WM. M. HOAG.
WM. H. WATSON.

Subscribed and sworn to before me this 16th day of Oct., A. D. 1897.

[SEAL.] F. D. MONCKTON,
Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

(Endorsed:) Bond on appeal to U. S. Supreme Court. The form of the within bond and sufficiency of the sureties approved Oct. 16, 1897. Wm. W. Morrow, circuit judge. Filed Oct. 16, 1897. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

119 United States Circuit Court of Appeals for the Ninth Circuit.

THE ANGLO-CALIFORNIAN BANK, LIMITED, Appellant, }
v. }
THE SECRETARY OF THE TREASURY, Petitioner, etc., Appellee. } No. 273.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing one hundred and seventeen (117) pages, numbered from one to one hundred and seventeen, both inclusive, to be a true copy of the record and of the assignment of errors and of all proceedings in the above-entitled cause, including the opinion filed, as the originals thereof remain

of record in said circuit court of appeals, and that the same constitute the transcript on appeal to the Supreme Court of the United States in said cause.

Attest my hand and the seal of said United States circuit court of appeals, at San Francisco, California, this 22nd day of October, A. D. 1897.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

120 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the United States of America and the United States attorney for the northern district of California and the Secretary of the Treasury of the United States, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, in the District of Columbia, on the fourteenth day of December, 1897, pursuant to an order allowing an appeal, duly filed and of record in the clerk's office of the United States circuit court of appeals for the ninth circuit, wherein The Anglo Californian Bank (Limited) is appellant and The Secretary of the Treasury is appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William W. Morrow, judge of the United States circuit court of appeals for the ninth circuit and United States circuit judge, this 16th day of October, A. D. 1897.

WM. W. MORROW,
Circuit Judge.

121 [Endorsed:] Dock. No. 273. U. S. circuit court of appeals for the ninth circuit. The Anglo-Californian Bank (Limited), appellant, *vs.* The Secretary of the Treasury. Citation. Filed Oct. 18, 1897. F. D. Monckton, clerk.

Received a copy of the within citation this 18th day of October, 1897.

THE UNITED STATES OF AMERICA,
THE SECRETARY OF THE TREASURY, AND
THE UNITED STATES ATTORNEY FOR THE
NORTHERN DISTRICT OF CALIFORNIA,
By SAMUEL KNIGHT,
Assistant U. S. Attorney for said District.

Endorsed on cover: Case No. 16,719. U. S. circuit court of appeals, 9th circuit. Term No., 506. The Anglo-Californian Bank, Limited, appellant, *vs.* The Secretary of the Treasury. Filed November 12, 1897.

No. 193.

Brief of Whyte for Appellant

Supreme Court of the United States,

OCTOBER TERM, 1898.

Filed Mar. 20, 1899.

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THE ANGLO-CALIFORNIAN BANK, LIMITED, *Appellant*,

vs.

THE SECRETARY OF THE TREASURY, *Appellee*.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of the Petition of the Secretary of the Treasury for Review of a Decision of the Board of the United States General Appraisers, Relative to Certain Twenty Steel Rails.

BRIEF OF APPELLANT.

WM. PINKNEY WHYTE,
Counsel for Appellant.

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STATEMENT.

This case presents an appeal from a decision of the United States Circuit Court of Appeals for the Ninth Circuit, affirming a Decree of the Circuit Court of the United States for the

Northern District of California, both of which Decrees it is sought by this appeal to reverse.

The course and manner of procedure in such cases are prescribed by sections 14 and 15 of the Act of Congress, entitled "An Act to simplify the laws in relation to the collec- " tion of the revenues," approved June 10, 1890, 26 U. S. Sta. 131. This Act is more familiarly known as the Customs Administrative Act of 1890. In accordance with its provisions the decision of the Collector, which was adverse to the importer, upon the protest of the latter, was reviewed and reversed by the Board of General Appraisers. On review of the last-mentioned decision, which was applied for by the Secretary of the Treasury, the Circuit Court reversed it, and in effect, affirmed the decision of the Collector. This decision of the Circuit Court was affirmed by the United States Circuit Court of Appeals, and these decisions are the subject of the present appeal.

The facts are few and simple. They are undisputed, being the subject of a stipulation of the parties, upon which the case has been tried throughout. (Rec., p. 13, Exhibit G.)

This particular merchandise was imported at the port of San Francisco, on the 2d day of March, 1887, by the Bank of California. It was part of 5,678 tons of like merchandise, imported by said Bank of California, at different dates between March 2, 1887, and the 24th day of June next following. On February 28, 1888, it was all subjected to warehouse entries, and placed in bond, in bonded warehouse. While in this condition it was purchased or assigned to the Anglo-Californian Bank Limited, the protestant and present appellant.

These entries were liquidated at the rate of $17 per ton, duty, the rate prescribed for such merchandise by the Act of March 3, 1883, then in force.

Upon the expiration of one year from March 2, 1887, the date of importation (the merchandise remaining in warehouse,) "an additional duty of ten per cent. was charged " upon the bonds against the merchandise" (Finding 2, Rec., p.

20,) under Section 2970 of the Revised Statutes. Four withdrawals for consumption were made prior to December 6, 1889, and within three years from the date of importations. The rest of the merchandise remained in bond, in the warehouse, duties unpaid, more than three years from the date of importation. No sale of merchandise, to enforce payment of duties was ever made, or steps toward one were ever taken; on the contrary, after the expiration of the three-year period, the Government permitted withdrawals, on various dates, between October 9, 1891, and March 24, 1894, amounting in all to 3,306 tons of rails, which had been in warehouse more than three years from date of importation.

The remainder of the merchandise continued in warehouse until March 16th, 1895, upon which day, the Anglo-Californian Bank Limited, withdrew said twenty rails for consumption, paying, under protest, duty at the rate of $17 per ton, which the Collector exacted under the Tariff Act of March 3, 1883, and an additional duty of ten per cent. also charged by the Collector against the merchandise entered.

This protest and the grounds thereof will be clearly understood when it is stated, that in the meantime, the Administrative Act of June 10, 1890, hereinbefore referred to, and the Tariff Act of October 1, 1890, (known as the McKinley Act) 26 U. S. Sta., and the Tariff Act of August 28, 1894, (the Wilson Act), had all been passed. To the end that this protest and the grounds thereof may be clearly understood, and for the sake of convenient reference, it is proper to quote the provisions of these Acts and those sections of the Revised Statutes here material.

REVISED STATUTES.

"Sec. 2970. Any merchandise deposited in bond, in any "public or private bonded warehouse, may be withdrawn for "consumption within one year from the date of original "importation, on payment of the duties and charges to which "it may be subject by law at the time of such withdrawal; "and after the expiration of one year from the date of origi-

" nal importation, and until the expiration of three years " from such date, may be withdrawn for consumption, on " payment of the duties assessed on the original entry and " charges, and an additional duty of ten per centum of the " amount of such duties and charges."

"Sec. 2971. All merchandise which may be deposited in " public store or bonded warehouse may be withdrawn by the " owner for exportation to foreign countries, or may be tran- " shipped to any port of the Pacific or Western Coast of the " United States, at any time before the expiration of three " years from the date of original importation; such goods on " arrival at a Pacific or Western port to be subject to the " same rules and regulations as if originally imported there. " *Any goods remaining in public store or bonded warehouse, beyond* " *three years shall be regarded as abandoned to the Government, and* " *sold under such regulations as the Secretary of the Treasury may* " *prescribe, and the proceeds paid into the Treasury.* In comput- " ing this three years, if such exportation or transhipment of " any merchandise, shall either for the whole or any part of " the term of three years, have been prevented by reason of " any order of the President, the time during which such " exportation or transhipment shall have been so prevented, " shall be excluded from the computation. Merchandise with- " drawn for exportation shall be subject only to the payment " of such storage and charges as may be due thereon."

"Sec. 2972. The Secretary of the Treasury, in case of " any sale of any merchandise, remaining in public store or " bonded warehouse beyond three years, *may pay to the owner,* " *consignee, or agent of such warehouse the proceeds thereof, after* " *deducting duties, charges, and expenses, in conformity with the* " *provision relating to the sale of merchandise remaining in a ware-* " *house for more than one year.*"

"Sec. 2973. If any merchandise shall remain in public " store beyond the period of one year, without the payment " of the duties and charges thereon, except as hereinbefore " provided, then such merchandise shall be appraised, by the " appraisers, if there be any such part, * * * and sold by

" the Collector at public auction, on due public notice thereof " being first given, in the manner and for the time to be pre- " scribed by a general regulation of the Treasury Department. " At such public sale printed catalogues, descriptive of such " merchandise, with the appraised value thereto affixed, shall " be distributed among the persons present at such sale, and " reasonable opportunity shall be given at such sale, to persons " desirous of purchasing, to inspect the quality of such mer- " chandise. The proceeds of such sales, after deducting the " usual rate of storage at the port in question, with all other " charges and expenses, including duties, shall be paid over to " the owner, importer, consignee, or agent, and proper receipts " taken for the same."

Section 2974 provides for the payment of the surplus of proceeds into the Treasury of the United States, if it remained unclaimed for the period of ten days after sale, and for its subsequent return to the owner on "proof of his interest."

Administrative Act 1890.

Sec. 20 of the Act of June 10, 1890 (the Administrative Act,) was as follows:

"Any merchandise deposited in any public or private " bonded warehouse may be withdrawn for consumption " within three years from the date of original importation, on " the payment of the duties and charges, to which it may be " subject by law, at the time of such withdrawal; provided " that nothing herein shall affect or impair existing provisions " of law in regard to the disposal of perishable or explosive " articles."

Section 29 of the same Act, after a specific enumeration of certain sections of the Revised Statutes, repealing them (but not specifically referring to Secs. 2970 and 2971,) contains the following:

* * * "and all other Acts and parts of Acts inconsist- " ent with the provisions of this Act are hereby repealed, but

"the repeal of existing laws, or modification thereof, embraced
" in this Act shall not affect any act done, or any right accru-
" ing or accrued, or any proceeding had or commenced in any
" civil cause before the said repeal or modifications; but all
" rights and liabilities under said laws shall continue and may
" be enforced, in the same manner as if said repeal or modifi-
" cations had not been made. Any offenses committed,
" * * * *"

McKinley Act, October 1, 1890.

The enacting clause of this Act was as follows:

"Be it enacted, etc., that on and after the 6th day of
" October, eighteen hundred and ninety, unless otherwise
" specially provided for in this Act, there shall be levied and
" paid upon all articles imported from foreign countries, and
" in the schedules herein contained, the rates of duty which
" are by the schedules and paragraphs respectively prescribed,
" namely:"

Then follows the schedules and paragraphs; among them was Schedule C, containing paragraph 141, which was as follows:

"141. Railway bars made of iron or steel, and railway
" bars made in part of steel, T rails, and punched iron or
" steel flat rails, six-tenths of one cent per pound." ($13.44 per ton.)

Section 50 of this act is as follows:

"Sec. 50. That on and after the day when this Act goes
" goes into effect all goods, wares, and merchandise previously
" imported, for which no entry has been made, and merchan-
" dise previously entered without payment of duty, under bond
" for warehousing, transportation, or any other purpose, for
" which no permit of delivery has been issued, shall be sub-
" jected to no other duty upon the entry or the withdrawal
" thereof than if the same were imported respectively after
" that day; provided that any imported merchandise, deposited
" in bond, in any public or private warehouse, prior to the 1st

"day of October, 1890, may be withdrawn for consumption at "any time prior to February first, eighteen hundred and "ninety-one, upon the payment of duties at the rates in force "prior to the passage of this Act, provided, further, that "when duties are based on the weight of merchandise, "deposited in any public or private bonded warehouse, such "duties shall be collected on the weight of such merchandise "at the time of its withdrawal."

Section 54 of this Act provided as follows:

"Sec. 54. That Section Twenty of the Act entitled 'An "Act to simplify the laws in relation to the collection "of revenues,' approved June 10, eighteen hundred and "ninety, is hereby amended to read as follows:

"Sec. 20. That any merchandise deposited in bond in any "public or private bonded warehouse may be withdrawn for "consumption within three years from the date of original "importation, on payment of the duties and charges, to which "it may be subject by law at the time of such withdrawal. "Provided, that nothing herein shall affect or impair existing "provisions of law in regard to the disposal of perishable or "explosive articles."

Section 55 of this Act also provided as follows:

"Section 55. That all laws and parts of laws inconsistent "with this Act are hereby repealed. Provided however, that "the repeal of existing laws, or modifications thereof, embraced "in this Act, shall not affect any act done, or any right accru- "ing or accrued, or any suit or proceeding, had or commenced "in any civil cause, before the said repeal or modifications, "but all rights and liabilities under said laws shall continue "and may be enforced in the same manner as if said repeal "and modification had not been made."

Wilson Act, August 28, 1894.

The enacting clause of this Act is as follows:

"Be it enacted, etc., * * * , that on and after the 1st "day of August, 1894, unless otherwise specially provided for

" in this Act, there shall be levied, collected and paid, upon " all articles, imported from foreign countries, or withdrawn " for consumption, and mentioned in the schedules herein con- " tained, the rates of duty which are by the schedule and " paragraphs, respectively prescribed, namely: "

Among the schedules and paragraphs of the Act is Paragraph 117 of Schedule C, which is as follows:

"117. Railway bars, made of iron or steel, and railway " bars made in part of steel, T rails and punched iron or steel " flat rails, seven twentieths of one cent per pound" (or com- " puting upon statutory basis, of 2,240 pounds to the ton, " $7.84 per ton.)

There are in the Act a few repeals of specifically enumerated laws, and the following general repealing clauses.

"Sec. 72. All Acts and parts of Acts inconsistent with the " provisions of this Act are hereby repealed, but the repeal of " existing laws or modifications thereof, embraced in this Act, " shall not affect any act done, or any right accruing or " accrued, or any suit or proceeding had or commenced, in " any civil cause, before the said repeal or modifications; but " all rights and liabilities under said laws, shall continue and " may be enforced in the same manner, as if said repeal or " modifications had not been made. * * * "

Grounds of Protest.

Under these conditions of facts and legislation, the grounds of protest briefly stated in substance were, that the Act of March 3, 1883, prescribing a rate of duty upon such merchandise of $17 per ton, and Section 2970 of the R. S., imposing an anditional duty of 10 per centum upon merchandise which had remained in warehouse in bond under warehouse entry, for a period of more than one year from date of importation, do not apply to the present merchandise; and it is only dutiable under the Wilson Act, of Aug. 28, 1894, at the rate of $\frac{7}{20}$ of one cent per pound or $7.84 per ton, under paragraph 117 thereof.

THE CONTENTION OF THE PARTIES.

The appellant asserts:

That when the McKinley Act went into effect the specific rate of duty upon this merchandise was thereby changed from $17 per ton to $13.44; and this rate was again changed by the Wilson Act to $7.84 per ton.

2. That Sec. 2970, R. S., has been repealed by these enactments and is inapplicable to this merchandise.

The appellees contend:

1. That by permitting the merchandise to remain in warehouse for a period of more than three years duties unpaid from date of importation, it was abandoned to the government under Sec. 2971, R. S.

It is no part of the contention of appellant that, had this merchandise been sold by the Government in 1890, when the three years bonded period expired, the duties then due and payable would have been other than those of the Act of 1883. It is fully admitted that the duties then due were those imposed by that Act, including the ten per centum additional.

It is also admitted that the same rates of duty would have then applied, whether the goods had been sold by the Government to satisfy its claim, or had been withdrawn for consumption and the duties paid by the importer.

It is further admitted that these rates applied until Congress made a new tariff changing the rate and amount of duty, on "all goods * * * previously imported * * * under "bond, for warehousing * * * *or for any other purpose* for "which no permit of delivery has been issued" (Sec. 50, McKinley Act).

It is further admitted that at the termination of the bonded period of three years the lien or claim of the Government matured in the sense that the goods were subject to sale; and it is also admitted that the Government at the expiration of the three years could have sold this merchandise by virtue of Section 2971, R. S., but would have been required to turn

over to the importer the excess of proceeds, after deducting the duties and charges incurred by the goods. The liability, however, of the owner to lose his goods by their sale was the only disability incurred under the statute.

Nor are the general propositions of law disputed, that the Statutes relating to the customs revenues shall be construed as a whole and complete system of laws, and that each alteration must be considered in the light of its evident bearing in relation to the entire customs revenue system. It is denied that this merchandise became the *property* of the Government at the expiration of three years from the date of its importation, as claimed by the Solicitor General for the appellee.

Argument.

I.

The nature of the interest of the goverment in imported merchandise. Ownership always remains in the importer.

It is obvious that it cannot be intelligently ascertained whether merchandise has been abandoned by an importer, and whether any right has been saved to the government or any individual, at a particular time, or by the occurrence of events or conditions, without an understanding of the nature of the right itself, in its relations to the system of laws creating it; and so it is to be remembered that the duties imposed upon imported merchandise are imposed for the sole purpose of collecting revenues for the use of the government, and are in the nature of tax laid upon the goods themselves. They are not intended, primarily or at all, to afford means of acquiring title to the merchandise, or divesting the owner of it. The merchandise is taken possession of by the government immediately upon its arrival, strictly as security for the payment of duties to which it is subject, and this right to duty accrues as soon as it arrives in port. The right does not arise from the possession of the merchandise, but by virtue of their importation. (The Liverpool Hero, 2 Gall.,

184; *U. S.*, vs. *Vowell*, 5 Cranch., 368; *Meredith* vs. *U. S.*, 13 Peters, 486; *U. S.* vs. *500 Boxes*, 2 Abb., 500.)

Although the duties attach instantly upon importation, the owner is given an option either to pay the duties immediately and take possession of the goods, or to postpone the payment by depositing them in bonded warehouse, giving bond in double the sum of the estimated duty (Sec. 2964, R. S.)

The bond mentioned is further security for the payment of the duty.

But it cannot be resorted to until the goods are withdrawn and a deficiency arises, or upon deficiency arising after sale.

The merchandise remains in the possession of the Government at the sole risk and expense of the owner (Sec. 2965 R. S.; *Clark* vs. *Peaslee*, 1 Cliff., 545; *U. S.* vs. *Benzon*, 2 Cliff., 512.)

The relation of the Government and the importer are in no sense contractual; their rights are created by law and subject to change at any time by law. Congress has the power, and exercises it, to increase or decrease, or to entirely remove the duty on merchandise while remaining in bonded warehouse (*U. S.* vs. *Benzon*, *supra.*)

We assert that under the Statutes, as they now stand, the Government never acquires title to imported merchandise. It belongs to the importer until sold, and then it belongs to him who buys it, and there is no authority for the Government to buy it. This conclusion is made more manifest and certain from the fact that at all times, no matter how long the merchandise remains in warehouse, it is there at the expense and risk of the owner. In the present case it is not contended that after the expiration of three years the Government ever paid any storage, any insurance, or incurred any liability whatever touching these goods, after the expiration of three years, as it naturally and necessarily must have done if they had passed to the ownership of the Government. On the contrary, the importer was required by law, by the regulations of the Treasury, and by the administrative officers, to

pay and discharge all such charges, and respond to all the liabilities of ownership, and the importers met the requirements. (See Stipulation, Exhibit G, Rec. p. 14.)

If the Government had owned this merchandise, why did they permit, not only permit, but require, importers to carry burdens which the law rested on its own shoulders as owner?

As to the present merchandise, the ownership of the importer was further recognized by permission to him to withdraw it at all times after the expiration of three years, up to and including the present entry, and by subsequent permission to withdraw the entire importations, involving twenty different transactions, and the payment of duties of over $50,000, in harmony with Section 4 of the Administrative Act of 1890, which limits the right to make entry to the owner, consignee, or agent, and in all cases requires the oath to be supported by the oath of the owner.

Authority and power of Secretary of the Treasury.

This recognition of ownership in the importer by the Secretary of the Treasury, was not the act of an unauthorized agent of the Government, and therefore, *ultra vires*. The rights of the Government as to the duties owing to it and the manner of enforcing payment, including sale, have been prescribed by law from the time of the enactment of the Warehouse Act in 1846, down to the present time; and throughout this whole legislation the broadest powers have been given to the Secretary of the Treasury to prescribe regulations as to modes. The statutes and the rulings of Courts make him the superintendent of the collection of the revenues, and in the exercise of his administrative functions respecting the manner of collecting, no restraint is placed on his discretion when it does not contravene the express requirements of the statute (Sec. 249, R. S.; *Aldridge* vs. *Williams*, 3 How., 9; *Campbell* vs. *U. S.*, 107 U. S., 407; *Balfour* vs. *Sullivan*, 17 Fed. Rep. 31; *Pascal* vs. *Sullivan*, 31 Fed. Rep. 496; *U. S.* vs. *Jones*, 18 How. 92.)

The power to sell was conferred, but the time of sale was not fixed by statute, and the postponement from time to time

was fully within the exercise of his discretion and subject to the language to be found in all the revenue statutes and Acts, conferring the power to make regulations as to such sales. There is certainly no express provision prohibiting the postponement of sale, or the power of the Secretary of the Treasury to permit withdrawal after the expiration of the three year period; so that the recognition of the ownership of the importer by the Secretary of the Treasury after the expiration of three years becomes binding and conclusive upon the Government; and the fact that this construction of the statutes recognizing the importer as the owner of the merchandise, has continued and been accorded, unbrokenly and unbendingly, for a period of more than twenty-two years, is persuasive of the proper meaning of these statutes, as has often been declared by the Courts, and would be sufficient to turn the scale if any doubt or ambiguity existed. (*United States* vs. *Jahn*, 65 Fed. 792, C. C. A.; *Roberson* vs. *Downing*, 127 U. S., p. 607; *Brown, Admrx.*, vs. *United States*, 113 U. S. 568; *Dixon* vs. *U. S.*, 68 Fed., 534.)

In the case of Roberson, *supra*, the Court say: "The "regulation of a department is not, of course, to control the "construction of an Act of Congress, when its meaning is "plain, but when there has been a long acquiescence in a "regulation, and by it, rights of parties for many years have "been adjudged and adjusted, it is not to be disregarded "without the most cogent and persuasive reason."

In the case of Brown, *supra*, the Court said, in conclusion: "These authorities justify us in adhering to the construction "of the law under consideration adopted by the Executive "Department of the Government."

Edwards vs. *Darby*, 12 Wheat., 206.
U. S. vs. *Hill*, 120 U. S., 169, 182.

While the letter of the Secretary of the Treasury to the Collector relative to this present merchandise (Rec. p. 11), which finds its way into this record, only because of the peculiar provisions of the Administrative Act of 1890, recites

that a reference to the decisions of the department for a long series of years shows that it has uniformly held that duties on merchandise in warehouse beyond three years was not subject to subsequent increase or decrease, it is remarkable that not one regulation or decision of this uniform line was instanced, or can be found until the entry of the present merchandise. And this assertion becomes more remarkable, in view of the fact that Article 767, of the Customs Regulations of the Treasury Department (Edition of 1874), and Article 1031, of the Edition of 1884, both recognize the right of the importer to enter his merchandise and pay the duties after the expiration of three years. And Treasury Department Circular (dated February 29, 1884), still in force, expressly authorizes the withdrawal of merchandise which has remained in bond more than three years after that date, a fact which was referred to and which was persuasive in the decision of the Board of United States General Appraisers in this case. (Rec. p. 18.)

Moreover, in *United States* ats. *Abbott*, 20 Court of Claims Rep. 280, the practice of allowing such withdrawals was referred to by the Court as grounds of its decision as then in existence and reference is made to an opinion of the Attorney-General, dated February 7, 1884, in which the practice was alluded to as then existing, and approving that practice as conforming to law. (See also Appendix.)

II.

The words "shall be regarded as abandoned to the Government," used in Section 2971, were repealed by the latter Sections 2970–2973 and 2974.

These sections were all enacted in the Revised Statutes at the same time, but an examination of previous revenue legislation shows that their provisions are so repugnant as to deprive the words quoted of all reasonable meaning and effect under the rule that when provisions of the same Act are so repugnant that they cannot be otherwise harmonized, those

occurring earlier must yield to the latter. (Sutherland on Statutory Construction, Sec. 220, and cases cited in note.)

By the Warehouse Act of August 6th, 1846, (9 U. S. Stat., 53), one year was allowed for payment of duties on warehoused merchandise on withdrawal for consumption, or for exportation without payment. At the expiration of one year the merchandise, if not withdrawn or exported, was to be sold, after public notice prescribed by the Treasury Department, as to time and manner, "and the proceeds of sale, after "deducting storage, charges, expenses and duties should be "paid over to the owner, importer, consignee or agent." By the Act of March 3rd, 1849, (9 U. S. Stat., Sec. 5, p. 399), the time for exportation was extended to two years.

By the Act of March 28th, 1854, (10 U. S. Stat., Sec. 4, p. 271), it was provided that merchandise entered for warehousing might continue in warehouse for the period of three years, even after the payment of duties.

By the Act of August 5th, 1861 (12 U. S. Stat., Sec. 5, p. 293), as a war measure to hasten the payment of revenue, it was provided that warehouse goods "designed for consump-"tion in the United States must be withdrawn, or the duties "paid, within three months after the same are deposited, or "within two years, upon payment of the duties, with 25 per "cent. additional, or may be withdrawn for exportation at "any time before the expiration of three years; such goods, "if not withdrawn in three years, to be regarded as aban-"doned to the government, and sold under such regulations "as the Secretary of the Treasury may prescribe, and the "proceeds paid into the Treasury." (The first time words as to abandonment were used and the first time the proceeds were required to be paid into the Treasury, and not to the owners, etc.)

This was followed by the Act of July 14th, 1862 (12 U. S. Stat., Sec. 21, p. 560), still under the exigency of war, which provided that merchandise "thereafter deposited in bonded "warehouse must be withdrawn or the duties paid within "one year," or withdrawn for exportation within three years,

and that "any goods remaining in public store or bonded "warehouse beyond three years shall be regarded as aban- "doned to the Government and sold, under such regulations "as the Secretary of the Treasury may prescribe, *and the pro- "ceeds paid into the Treasury.*" The requirements in both the Acts, using the words relative to abandonment, were that as an effect the proceeds of sale were to be paid to the Treasury, regarding the owner as having no further interest in them.

By the Act of July 28, 1866 (14 U. S. Stat., Sec. 10, p. 330), the provisions of the Act of 1846 were amended so as to restore the requirement of the last mentioned Act that after sale of the merchandise the excess of proceeds should be paid to the owner, etc; and by another Act of the same year, March 14 (14 U. S. Stat., Sec. 1, p. 8), the time for withdrawal for consumption was extended to three years, on payment of duties and an additional 10 per cent. It will be seen, therefore, that the Acts of 1846, 1861, 1862, and 1866 are wholly inconsistent as to the disposal of proceeds, and that their re-enactment into Sections 2971, 2972, *et seq.*, of the Revised Statutes necessarily leaves the provisions of those sections equally so, so as to bring them fully within the rules of construction here invoked in respect to the effect of later upon earlier provisions in cases of repugnancy (*U. S.* vs. *Abbott*, 20 Court of Claims, page 280).

The effect of these statutes is to be gathered by a reading of their context and by a comparison one with the other, and by at all times keeping in mind the purpose of tariff legislation and the system of revenue laws. The revenue law as a body must be taken by its four corners, and in all cases of conflict specific intent must control general intent.

That repugnancy exists between the provisions of Sections 2971 and 2972 is shown by the fact that from the time of the Warehouse Act of 1846 to the Act of 1861 every incident to ownership remained in the importer up to the time of the payment of the surplus of the proceeds of sale to him. The title literally remained in him until such sale, and after the

sale, in the converted form, his title attached to the excess of the proceeds, as the result of his ownership of the merchandise.

From 1861 to 1866 the law declared his property was abandoned after the expiration of three years, and all incident rights of ownership surrendered. The proceeds were paid absolutely into the Treasury, and could not be followed by its previous owner, and they were deemed abandoned.

In 1866 the Act of Congress restored the provisions of the Act of 1846, and by them his right to follow the proceeds of sale, as to the excess over duties, etc. These conditions are clearly inconsistent with each other, and necessarily the Acts of Congress creating them were also inconsistent; otherwise there would have been no change or necessity for the enactments themselves. Both the Acts of 1846 and 1862 were re-enacted into revision of the statutes, their inconsistencies with them.

We have seen that by the practice of the Treasury Department, Sec. 2971, as to abandonment, has been construed as repealed, but we desire to call particular attention to the Abbott case, 20 Court of Claims, 280, *supra*.

Abbot Case.

The decision in this case was by the Court of Claims. It involved a construction of the Act of 1883, and related to 66,575 pounds of wool in bonded warehouse at Boston, where it had been beyond the period of three years.

A section of that Act provided as follows:

"That all imported goods, wares, and merchandise which "may be in the public stores or bonded warehouses on the "day and year when this Act shall go into effect, except as "otherwise provided in this Act, shall be subjected to no "other duty upon the entry thereof for consumption than if "the same were imported respectively after that day; and all "goods, wares, and merchandise remaining in bonded ware-"houses on the day and year this Act shall take effect, and

" upon which the duties shall have been paid, shall be entitled " to a refund of the difference between the amount of duties " paid and the amount of duties said goods, wares, and " merchandise would be subject to if the same were imported " respectively after that date."

The duties had been paid in March, 1871, and a claim for refund, under the Act of 1883, was made. The defense was abandonment under Sec. 2971, R. S.

The Court of Claims held that the claimants were entitled to this refund.

We quote the pertinent part of the opinion of Judge Schofield, who spoke for the Court:

" The language of this section, so far as it relates to goods " upon which the duties had been paid, is very general. " Taken by itself, it fully sustains the claimants' demand, for " their goods were in the bonded warehouse when the Act " went into effect, and the duties had been paid."

The defendants, however, contend that the claimants can derive no benefit from this section because their goods, having been in bonded warehouse for more than three years, were abandoned to the Government, under Section 2971, Revised Statutes. This section provides that " any goods " remaining in public store or bonded warehouse beyond " three years shall be regarded as abandoned to the Govern- " ment, and sold under such regulations as the Secretary of " the Treasury may prescribe."

" Standing by itself this section might support the defend- " ant's position. It implies that the title of the original " owners, by lapse of time and operation of law, has become " divested and the Government has succeeded to the owner- " ship. The original Act, July 14, 1862 (12 Stat. L., p. 560), " from which this section is taken, was based upon that " theory, and so it provided that the proceeds of sale should " be paid into the Treasury. The character of this provision " and purpose of the Government have been entirely changed " by the Act of July 28, 1866 (14 Stat. L., p. 330), now Sec-

"tion 2972, which provides that 'the Secretary of the "Treasury may pay to the owner, consignee, or agent of such "merchandise the proceeds thereof, after deducting duties, "charges, and expenses.'"

"Since this enactment the goods are no longer to be re-"garded as abandoned by the owner to the Government. "The ownership continues without change, but after the sale "attaches to the net proceeds instead of the goods. The two "sections construed together provide a mode for the collec-"tion of duties and charges, and the clearance of the ware-"houses. When the goods have remained in bond more than "three years the Government acquires a right to sell them "for the purpose named, but cannot pocket the proceeds. "Hence the practice has arisen in the Treasury Department "to allow the owner at any time before the goods are adver-"tised for sale, to remove the same, upon the payment of duties "and charges. Of this practice the Attorney-General, in an "opinion addressed to the Secretary of the Treasury, dated "February 7, 1884, says: 'I perceive no legal objection to "the existing practice of your department * * whereby, "in lieu of a formal sale, the owner, consignee, or agent, is "permitted to pay the duties, charges, etc., that have accrued "thereon, and take them away."

"We not only see no legal objection to this practice, but "we do not see how the Secretary could, with propriety, "adopt any other. A sale of the goods for the mere pur-"pose of collecting charges or clearing the warehouse, while "the owner is willing to pay the charges and remove the "goods, would only cause trouble and expense, without a "particle of advantage to anybody, except possibly to spec-"ulative purchasers at forced sale."

"It may also be observed that the tenth section of the late "Tariff Act is remedial in its purpose, and to effect that "purpose should be liberally construed. By its terms 'all "goods, wares, and merchandise remaining in a bonded ware-"house on the day and year this Act shall take effect, and "upon which the duties shall have been paid, shall be entitled

" to a refund,' etc. The claimants' goods remained in the " bonded warehouse and the duties had been paid. No sale " had been authorized, and, according to the practice of the " Treasury Department, none would be authorized unless the " owners refused to pay the charges and remove the goods."

"Apparently Congress intended that all goods remaining " in the bonded warehouse July 1, 1883, and which, according " to the construction and practice of the department under " Sections 2971 and 2972 might be withdrawn by the consig- " nee upon payment of duties and charges, should go upon " the market with no heavier burdens than were to be im- " posed under the new tariff, upon latter importations."

It must be remembered that under the regulations of the Treasury Department at the time of the Abbot importation (in 1881), imported merchandise was permitted to remain in bonded warehouse even after the payment of duty. The Act of 1883, as is seen from the section above quoted, provided for a refund of duty upon such merchandise, if a higher rate had been paid thereon than the Act imposed. This was done for the reason that although duties had been paid the merchandise had not entered the market, and according to uniform policy, provision was made to permit its entrance into the market upon equal footing with like merchandise thereafter imported.

This legislation was specific, relating to this particular class of merchandise, namely, warehoused goods on which duties had been paid. The form in which the issue was presented to the Court necessarily involved the construction of Section 2971, because the defense was that the merchandise had been abandoned by remaining in warehouse more than three years.

The decision comports with the well defined principles underlying tariff legislation, and adopted by courts in construing it, that effort must not be made to find technical meaning in words and phrases merely to subject the importer to the payment of higher rates of duty; and all obscurities, if they exist, shall be resolved in his favor and that penal effect

should not be given to revenue statutes except in cases of express provision.

The Court could not have reached any other conclusion without violating all of these principles. To hold that the owner of property should be divested of his title thereto at a given point of time to be revested at another without his consent, or any act of the owner, would be technical in the strictest sense of the term and would attach a punitive effect to the law in the highest degree.

This is made plain by the reference of the Court to the inutility of a sale when the importer desires to pay the duty. Under the warehousing system, now existing, merchandise therein cannot become subject to any charge except duties and such as are incident to their custody, and these charges apply to all merchandise without respect to the period during which they have been warehoused. The Government derives no benefit from storage and incurs no risk or liability for safe keeping, nor does it derive any benefit or advantage from the sale, which it would not have gained if the importer had paid the duties and charges before sale. In case of sale, however, the owner would be punished by loss of possession and control of the property. He would be prevented from subjecting it to the performance of contracts made respecting it, probably to his great damage, and with great disturbance to his business affairs, and he would be mulcted in a sum equivalent to the expenses of sale, besides which the surplus of proceeds finally received by him would be further diminished by the exigencies of a forced sale.

As stated by the Court in the Abbot case no person would be benefited but the speculative purchaser at a forced sale.

It is not possible that the tariff law intends such a meaning to be derived from its words and provisions.

The opinion in the Abbot case was rendered by Judge Schofield, who had served for many years as a member of Congress. Besides this, Judge Schofield had had a long experience as Justice of the Supreme Court of the State of Pennsylvania.

The Court of Claims is itself of dignified rank, as a judicial body, and the decision in the Abbot case was not appealed from and has been accepted by the Treasury Department as the law governing the business of the country respecting merchandise in warehouse, since its rendition, in 1885.

This case was presented to the Court by the Assistant Attorney-General and Mr. Blair, who had himself had a long experience as an officer of the Department of Justice.

Mr. George S. Boutwell presented the case on behalf of the importer. The history of this distinguished attorney is familiar to this Court. He had been successively Governor of Massachusetts, member of Congress, Commissioner of Internal Revenue, again member of Congress, Secretary of the Treasury, then U. S. Senator. He is one of the most distinguished lawyers in the country in all branches of the profession, but particularly that one which relates to the revenue laws.

III.

Matters to be considered in ascertaining intent of statutes.

Rules of Interpretation.

The meaning of words will be expanded or limited in order to harmonize all sections to reach the intent, and give effort to all provisions.

Sutherland, Sec. 218.

It is therefore proper to consider the meaning of the word "abandonment," as used in other statutes, in order to derive the general sense of the doctrine of abandonment, and whether it can be made to apply to this case.

This doctrine is not frequently invoked or adopted by the United States Statutes.

Provision was made for the sale of captured or abandoned property during the Rebellion (Sec. 1079, R. S.,) and for the sale or collection of abandoned or derelict public property (Sec. 3755,) and for the reversion to the Government of land abandoned by a settler for more than six months (Sec. 2297.)

Aside from Section 2971, under consideration, the word abandonment only stands in tariff legislation in the Act of July 14, 1862, of which 2971 is a re-enactment, and in Section 23 of the Act of June 10, 1890, in which latter provision is made for the abandonment to the United States of damaged merchandise, by which abandonment the importer is relieved from the payment of duties.

In all of these instances, excepting that of 2971, the word abondonment involves the element of the voluntary surrender or giving up of the property dealt with.

In the case of captured or abandoned property, in times of war, the property is contraband and confiscated as belonging to a public enemy.

In the case of the preservation and sale of wrecked, abandoned or derelict property, the statute deals with its own property, and that subject to maritime disaster and condition.

There is a further maritime use of this word, relating to the surrender of vessels by the owner to, or for the benefit of, his creditors, by which he is relieved of certain further liabilities.

In the case of abandonment by a settler on the public domain it is simply the lapse of an incohate right, since the title to the land remains in the Government until all the law is complied with and the settler voluntarily surrenders his right to perfect title.

In the case of the surrender of damaged imported merchandise by the importer, under Section 23, he voluntarily surrenders the property to the Government to become and be its own, on the condition that he be relieved from the payment of duties thereon.

He says to the Government, this property is not worth the duties to me, you may take it and absolve me from the payment of the duties. I have no further claim upon or interest in it. You may sell it and have all the proceeds, and under Section 23, the Government is compelled to accept this proposal.

There can be no question that when this word abandonment first appeared in tariff legislation in the Acts of 1861 and 1862, it was intended that the importer or owner, who left his merchandise in warehouse beyond the period of three years, should lose all the rights incident to ownership, and that the Government should acquire them. It may be well doubted whether such drastic legislation did not violate the Constitution of the United States by summarily depriving the owner of his property upon the mere maturity of a debt, and without compensation and due process of law; but however that may be, unquestionably it was the intention of that Act that the property and all the right and interest of the importer in it should be taken from him.

The Act of August 6, 1845, (9 Stat. at Large, page 53,) made provisions for the sale of merchandise of this class, and for the payment of the excess of proceeds of sale after deducting duties, etc., to the owner just as Sections 2972-3-4 now do.

This provision continued in force up to the Act of 1861. The word abandonment had not yet appeared. But in that year, under the exigencies, conditions, and wants of the nation incident to that time, demanding means for the maintenance of the public credit and expedition in the collection of revenues, and to fix a time when revenue debts might be collected and payment enforced, Congress passed the Act (12 Stat. at Large, page 559), by which, for the first time in tariff legislation, it was declared that an owner could be compelled to abandon his property by merely leaving it in a bonded warehouse for a given period of time.

For the first time he was then deprived of any right or claim to any part of the proceeds of the sale of his merchandise. This provision was substantially repeated in the Act of 1862, when the provisions of the Act of 1846 were restored, as to the ownership of the merchandise, and the excess of proceeds of sale.

Whatever flexibility these words concerning the abandonment of merchandise possess, must be tested in this manner.

Consideration must be given to the nature and purpose of the warehouse system, which has been characterized by Mr. Gladstone as the greatest agency for the promotion of commerce known to modern civilization. The permission to leave merchandise in the warehouse under bond for the payment of duties, is in the direction of extension of credit for such payment, given by the Government, out of regard for the welfare and business interests of importers in marketing their importations, so that the revenue laws may be enforced with as little disturbance to public business as possible, since the duties upon imports are the chief sources of the revenues of the country, and the welfare and the prosperity of the nation depend upon them.

This policy is further made manifest by the provisions, uniformly enacted into tariff laws, when changes of rates have been made, to enable importers to adjust their business in the payment of duties, to meet the new order of things, and to place them upon a parity of footing in the markets, with previous and subsequent importers of merchandise, upon which duty has not already been paid. The laws which we are now discussing in this case are instances, and its predecessors are innumerable.

It is to be remembered, too, that revenue statutes are not penal in character, but remedial, and that they are enacted under the power of the Government to tax, and that when the exercise of this power is invoked, the tax cannot be sustained, unless it appears fully to come within both the letter and the spirit of the law, and if there are doubts upon a question, and two constructions may be given to statutes, one of which would impose the tax, and the other not, the latter construction in favor of the importer, should be adopted.

Sutherland, Section 351.
Vittells, 20th Rule of Construction.
National Bank vs. *Deering*, 91 U. S., 29.
Renfroe vs. *Calguitt*, 74 Ga. 619.
Taylor vs. *U. S.*, 3 How., 197.
U. S. vs. *Minderse*, 7 Blatch., 483.

U. S. vs. *Breed*, 1 Sum., 159.
U. S. vs. *Isham*, 17 Wall., 504.
U. S. vs. *Wiggleworth*, 2d Story, 569.
U. S. vs. *Morse*, 3d Story, 87.
Adams vs. *Bancroft*, 3d Sum., 387.

In *Adams* vs. *Bancroft*, the Court says: "Laws imposing "duties are never construed beyond the natural import of the "language used, and duties are never imposed upon the "citizen upon any doubtful interpretation, for every duty "imposes a burden upon the public at large and is construed "strictly, and must be laid out in a clear and determined "manner from the language of the statute."

In *United States* vs. *Isham*, *supra*, the Court says: "A tax "cannot be imposed without clear and express words to that "purpose."

In *United States* vs. *Wigglesworth*, the Court says: "Statutes "levying duty on citizens and subjects are to be construed "most strictly against the Government, and in favor of the "citizen or subject, and their provisions are not to be "extended by implication beyond the clear import of the "language used."

Hartranft vs. *Weigmann*, 121 U. S., 615.

Nor can the fact be ignored that the retention by the Government of merchandise for security for the payment of duties, in a certain degree, deprives the importer of the enjoyment of his property, and, to that extent, is an interference with legitimate industries and the ordinary uses of property, which are treated with conservative regard for the liberty of the citizen in his laudable business. "Such interferences," says Mr. Sutherland, (Section 370), "are cautiously justified "on principles of the common law, and only in cases of "imperative necessity, or under valid statute plainly express-"ing the intent."

Thus, reading these sections of the Revised Statutes, it must be gathered from them that they are intended to govern

the collection of duties on merchandise at such rates as the law may provide; that they contemplate that changes may be frequently made; that the Government extends credit to the importer for the convenience of his business, and takes possession of the merchandise as a security for the payment of his debt; that during the period of three years it is not intended that this debt should be enforced, or at all, until the importer, and no other person, pays the debt and takes the merchandise away; that the expiration of three years was fixed by the Government as the time at which it could proceed to enforce the payment of the debt by resorting to its remedies, by sale of the merchandise and application of the proceeds to the payment of the duty, and of the excess over such duties and charges, to the owner, or, if there should be a deficiency, then by proceedings against the principal and the sureties on the bond. But in the absence of express provision to that effect, it is not to be inferred that there can be any time, so long as the merchandise is undisposed of, that the owner has not the right to pay his debt and take his property.

It is not to be presumed that Congress intended to punish the importer by subjecting his property to a forced and unnecessary sale, from which the Government would derive no benefit, or that the owner, on the mere maturity of the debt, was to practically forfeit his merchandise; but every intention of the statute is met, and all of its provisions are harmonized with ascertained intent, under that construction by which they are read as giving to the Government the power to sell upon the expiration of three years, just the same power as was contained in the Act of 1846, but without regard to the words relating to abandonment.

It might be safely admitted that this power to sell at such time still stands in the statutes as fixing the time for the maturity of the debt, and that such a right in the Government has been saved, but it would by no means follow that upon the expiration of three years, the rights of the importer are foreclosed by the mere lapse of time; and this is evidenced

by the provisions made for the payment of the surplus to the owner, and the minute precautions in the statute to protect the rights of the owner at every step, before, at, and after the sale. At every step the right of ownership is recognized by the statute; at every step the owner, as such, is named in the statute.

IV.

Effect of the Administrative Act of 1890, and the McKinley and Wilson Acts, upon this merchandise.

Assuming that we have satisfactorily shown that the abandonment provisions of Section 2971 do not apply to this merchandise, it is evident that these Acts changed the rate of duty upon this merchandise, unless something in their provisions can be found to except it from their operations, and the question is fairly and squarely presented whether the right of the Government to collect duties on certain merchandise, at a certain rate, which has been specifically changed by a subsequent Act, is saved to the Government, by general saving words as to accrued rights found in the same Act, which changes the rate. In other words, whether an Act which provides that on and after its passage "there shall be "levied, collected, or withdrawn for consumption on all "articles imported from foreign countries, or withdrawn for "consumption and mentioned in the schedules herein con-"tained, the rates of duty which are by the schedules and "paragraphs respectively prescribed," and which repeals all Acts and parts of Acts inconsistent with it, not merely by implication, but by express words to that effect, saves the rights of the Government to levy and collect duties at previously existing rates on merchandise withdrawn for consumption, after the passage of the Act, by the general saving clause to the effect that said "Act shall not affect any act done "or any right accruing or accrued, or any suit or proceeding "had or commenced in any civil cause before the said repeal "or modifications; but all rights and liabilities under said "law shall continue and may be enforced in the same manner

"as if said repeal or modification had not been made." * * * (Wilson Act, Section 72).

The Administrative Act of 1890, as will be seen from an examination of its terms, was chiefly addressed to procedure and remedy, and changed modes of collection materially. (One important change was the creation of the Board of General Appraisers itself), and, by Section 29 of the Act, a similar saving provision as to acts done, liabilities incurred and rights accruing and accrued under existing laws was incorporated in that Act. At this time Section 2970, R. S., which imposed the additional 10 per cent. duty on goods remaining in warehouse after one year, was still in force, but the Legislators, perceiving that there was some obscurity in the language of that section as to the basis of the computation of the additional 10 per cent. cleared it up by the enactment of Section 20 of the Administrative Act of 1890.

Section 2970 required payment, upon withdrawal within one year, of the duties to which the merchandise might be subject at the time of withdrawal; but the same section required payment of the additional 10 per cent. to be made on goods withdrawn after one year, but before the expiration of three years, to be made upon the basis of the original entry, without regard to any change which might have been made in the meantime.

Section 20 of the Administrative Act placed it beyond question that the basis of the additional 10 per cent. upon all merchandise withdrawn after one year, should be the duties enforced at the time of the withdrawal, just the same as that withdrawn within one year; that is to say, that there should be no question that all merchandise in warehouse should have the benefit of any change which might be made while it was in warehouse, and thus the italics of the Circuit Court, have no more force and effect than if the print stood in long primer, as required by the rules of that Court. As we shall presently see, this section 20 was carried forward into the subsequent McKinley Act, Section 54, the effect of which, upon said Section 2970, will be hereafter considered.

THE MCKINLEY ACT.

Section 1 of this Act specifically required a levy and collection of duties on imported merchandise, on and after October 6, 1890, at the rates therein provided. It required the levy and collection to be made after that date.

Section 50 of the same Act imposed the same duty on all merchandise which was then in warehouse, whether entered or not, for whatever purpose it might be there, so long as no permit of delivery had been granted and duties had not been paid, as if the merchandise had been imported after the Act went into effect. It ought not to be questioned that the present merchandise falls within the provisions of this section and it is not questioned, unless there is something to be found in other provisions to take it out.

Is its status disturbed by Sections 54 and 55, as contended by appellee? We have discussed the effect of Section 20 of the Administrative Act, at the time of the passage of the last mentioned Act. When re-enacted by Section 54 of the McKinley Act, it gathered a new force and effect, because at the time of the passage of the Administrative Act no change had been made in the rate ot duty on this merchandise since the date of importation; but the purview of the McKinley Act was to change the rate, so that not only was the merchandise to be withdrawn under Section 54 at the rate to which they might be subject at the time of withdrawal, instead of the rate of original entry, but they were to be withdrawn without the payment of the additional ten per cent.; so that Section 51 repeals Section 2970 *in toto*. This is not only admitted by the appellee in this case; but the decision of the Courts are uniform to that effect.

Opinion of Attorney-General, Jan'y 17, 1895.
Schmid vs. *U. S.*, 54 Fed. 45.
U. S. vs. *McGrath*, 50 Fed., 404.
In re Schmid, 54 Fed., 145.

In the case of the *United States* vs. *Schmid*, *supra*, the question was whether the ten per cent. could be collected on

goods withdrawn from bond more than one year after deposit and whether Section 2970 had been repealed by Section 20 of the Administrative Act. In holding that such duties could not be collected on such merchandise, and that Section 2970 was so repealed, the Court quoted from the decision of the Supreme Court in *Hartranft* vs. *Oliver*, 125 U. S. 525, as follows:

"The plain meaning of this section is, that though the "goods are imported before the Act takes effect, yet if they "were kept until after that period in a public store or bonded "warehouse, that is, in the custody and under the control of "officers of the Customs they shall be subjected only to the "duties thereafter leviable when they are entered for consump- "tion. * * * In other words, goods imported before the "Act took effect, if kept in custody and control of the Gov- "ernment, are to be charged with duties according to the "law in force when they are entered for consumption."

The Rule of Inclusio Unius est Exclusio Alterius.

Clearly, thus far, Section 54 has not aided appellee's contention, but it may be urged that since Section 54 applies specifically to merchandise withdrawn within three years, an inference must be drawn that some other rate of duty must be deemed to apply to merchandise withdrawn at the expiration of the three year period. This position is untenable, for if there is anything in Section 54 which, by express language has the effect to change or modify the purview of the Act as contained in Sections 1 and 50, this would constitute what is technically known as an exception to the purview. So far as the express language of Section 54 is concerned, it is seen that it added to the purview by admittedly repealing Section 2970. So far as any inference to be drawn, from the exclusion of other merchandise is concerned, it is an unbending rule of construction that the purview cannot be enlarged, nor the exception curtailed by inference.

Sutherland, Sec. 328.

Roberts vs. *Yarborough*, 41 Texas, 452.

Wallace vs. *Stevens*, 74 Texas, 559.

And here it may be observed, that it is impossible to perceive the distinction by which Section 2970 is held to be repealed, and Section 2971 and the Act of 1873 are preserved in force. It is clear then that Section 54 of the McKinley Act left the purview of the Act unmodified as to the rates of duty imposed by it upon the present merchandise, and it now remains to consider the effect of the general saving words as to accrued rights, etc., of Section 55 of the McKinley Act, and what is here said upon this subject will apply equally to the same words to be found in Section 72 of the Wilson Act.

V.

The general saving words as to liabilities incurred, rights accruing and accrued, and acts done under existing laws do not relate to specific changes of duty.

The grounds asserted for the decision of the Court below seem necessarily to imply the admission that the duties on the merchandise in this case would have been changed by the McKinley and Wilson Acts, but for the provisions of the general saving clause as to accrued rights, etc., in these Acts, which are claimed to have preserved the former rates of duties.

Attention is called to the fact that the general saving words in these Acts apply to rights accruing, as well as accrued. What is meant by an accruing right? Could it be intended that from the moment that the Government's right to duty arose, upon the importation of merchandise, there could be no change as to rates of duties or methods of procedure or remedies in the enforcement of the payment of duty? Yet, if the contention of the appellee is correct, this result would follow, since every revenue Act, tariff and administrative, is found to contain similar words and clauses to those now under consideration, and thus from the beginning, rights accruing and accrued liabilities incurred, and acts done and performed under existing Acts, would have been continued in force and saved up to the present time.

The rights of the Government are not the only rights to be considered.

It is to be observed that while the appellee asserts that the right to collect duties at the rates enforced at the time of what is denominated as abandonment is preserved, no distinction between that and any other right to duties is suggested, nor are the rights of the importer to withdraw his merchandise at pre-existing rates considered.

If general saving words are to be given force, as contended by appellee, then at the time of the enactment of Section 2079, imposing an additional duty of 10 per cent., and of every act relative to abandonment, owing to the presence of general saving words, the importer would have had the right to withdraw his merchandise, without reference to the sections, by payment of duties at the rates in force prior to the enactment of those sections and laws; and, in case of increase by the subsequent law, could have invoked the saving words and clauses as saving his rights; but no such construction has ever been put upon the statutes; and it is a fact that today the department is engaged in delivering merchandise to importers which has been in the warehouse for a period of less than three years, and also beyond three years, at the rates of the present law, whenever the rate is higher than that imposed by the former law. Objection is never made, and permit to withdraw never withheld, under such circumstances. It is only when the present law reduces the amount of duties to be collected upon his merchandise, and a benefit will accrue to him from the change of rates, that the saving clause of these Acts is invoked by the Government and the importer gets into trouble.

Rules of construction as to saving words and clauses.

We think that it is plain that the question at bar is one as to the change in rate and amount of duty; that it confessedly appears that the change in rates and amount has been made by the McKinley and Wilson Acts, unless the saving clauses here considered have, by repugnancy to the purview of those

Acts prevented such change; and we assert that under the plainest and settled rules of construction the general saving words must yield to the specific purview (Sutherland, Sec. 221-246, and cases cited in notes.)

If then, the present merchandise meets the condition which would place it within the purview of either the McKinley or Wilson Acts, as to rates, and of the change thereby made (and as we have seen, this seems to be admitted,) and it is necessary to resort to the general saving clause to prevent effect of the purview, or to change or modify it in any way, that clause must yield to the purview under this rule.

Again, in applying rules of construction to ascertain the meaning of the law as a whole, taken by its four corners, and there is conflict in its provisions, and it is necessary for one provision to yield to another, it is apparent that the precise meaning of each, as primarily appears from its form and the words used, must be preliminarily discerned, in a certain sense, for this purpose independently of each other; otherwise, the general rule would avail nothing. It could not be ascertained that a case of repugnancy had arisen. So now, it is proper to examine the saving clause by itself under ordinary rules as to its meaning and the effect of its words, taking it as a law, having for its purpose the saving of rights from effect of repeal of law. Thus, reading Section 55 of the McKinley Act and 72 of the Wilson Act, it is seen that they are general, so far as they relate to rights accruing and accrued, and liabilities incurred and acts done under the existing law. They save, first, any act done or any right accruing or accrued, and all rights and liabilities incurred under former laws; they then proceed to a specific enumeration of certain rights and classes of rights, among which are suits and proceedings had or commenced in any civil causes before the said repeal or modification; punishment of offenses, penalties, and forfeitures or liabilities which might have been prosecuted and punished; limitations applicable to civil causes or the prosecution of offenses or for the recovery of penalties and forfeitures; suits, proceedings, and rights and

acts upon which civil and criminal causes might be predicated.

Now, it is an unbending rule that general laws become specific by enumeration of the persons, things, and conditions to which they relate. General terms, accompanied by or concluding with specific enumeration are held to be limited to things of the same kind. It is restricted to the same genus as the things enumerated.

Sutherland, 268–270, and cases cited in note.

Tested by its own terms, the saving clause will be given definite and natural meaning by confining the general words therein to be found to the rights which are specifically enumerated, without doing violence to the purview of the Act and rendering it nugatory.

United States vs. *Campbell*, 10 Fed., 816.

In that case the imported merchandise had been entered and withdrawn and duties paid. Seven years afterwards a mistake was discovered in the liquidation, by which the Government had lost about $400 of legal duties. The United States then brought suit against the sureties on the bond, to recover this deficiency.

The Act of June 22nd, 1874, passed subsequent to the entry and original liquidation, made the liquidation binding and conclusive on all parties after one year from the date of payment of the duties and liquidation.

Previous to the passage of this Act the Government had been allowed, under former decisions, to re-liquidate duties against importers without any limitation of time, and such re-liquidation was a necessary condition precedent to the suit for deficiency arising under the erroneous liquidation, which, in that case, had taken place before the Act. The Court held the Act of 1874 applicable, and the remedy barred.

Upon this point, Judge Brown of the Southern District of New York, said : "It is urged that Section 26 of that Act " (June 22, 1874), declares that 'nothing herein contained " shall affect existing rights of the United States.' But it is

"impossible to hold, as it seems to me, that the effect of this "saving clause is to nullify every specific clause in the Act "when a right of the United States is affected. The Act "relates to several different subjects, and many of its provisions "modify, more or less, rights formerly existing. Section 16 "expressly applies to suits 'now pending,' and the existing "rights of the United States in such suits were greatly "affected thereby through a submission to the jury of the ques- "tion of actual intent to defraud.

"'Acts and parts of Acts inconsistent with the provisions "of this Act are repealed;' and then comes the saving clause "as to 'existing rights.' The general words of this clause "must be held to be subordinate to the specific provisions "of particular sections, which show a manifest intent to apply "to past transactions. The purpose of that clause was, I "think, simply to prevent any existing rights of the United "States from being wholly cut off, or affected otherwise than "expressly provided."

It follows, that at the time when the Wilson Act took effect, it found the merchandise at bar subject to the rates of duty prescribed in the schedules and paragraphs of the McKinley Act. The McKinley Act cannot be construed to mean that merchandise should be subject to a duty, say at the rate of $13.44 per ton, but the right of the Government is preserved, at the same time, to collect a duty upon the same merchandise of $17.00 per ton.

Repeals by Implication.

No question of repeal of statutes by implication arises in this case, so far as affects rates of duty. The repeals of inconsistent Acts and parts of Acts here considered are made by express words. Moreover, changes in rates and amounts of duties on merchandise are of the nature of revision, and the Acts prescribing such changes are substitutes for the former Act.

In re Strause, 46 Fed., 522.

The Wilson Act.

Section 1 of the Wilson Act contains a clear, definite, precise and mandatory provision which makes all merchandise imported or withdrawn for consumption, without regard to the antecedent condition of the merchandise so withdrawn, subject to the duties contained in its schedules and paragraphs. It specifically deals with the fact of withdrawal, and provides that imported merchandise, when withdrawn, shall be subject to said rates.

Indeed, the words "or withdrawn" are the chief substantive words describing the condition to which the rates of the Wilson Act are to apply. Strictly speaking, the word "imported" might have been omitted, because merchandise could not be withdrawn for consumption from the Custom House unless it had been imported merchandise. That word was a natural and apt word in the connection in which it was used, but it was not so significant or indicative of the intention of Congress in applying rates of duty as the words "or withdrawn" which follow it.

The section required that on and after the day when the Act took effect there should be levied and collected the prescribed duty on all imported merchandise; and as if that were not sufficiently definite to make known the intent of Congress, the words "or withdrawn" etc., were used, and in these words must be found the description of the condition to which the purview of the Act related. To hold otherwise would be to deprive the words "withdrawn for consumption," of all meaning. As stated by the Board in its decision: "The words 'or withdrawn for consumption' are new matter, " not appearing in the Acts of 1883 or 1890, and there is " abundant proof by the debates in Congress to show that " they were intended to place all merchandise in bonded " warehouses prior to August 1st, 1894, and entered for con- " sumption after that date, upon a parity with respect to rates " of duty with merchandise imported on and after August 1, " 1894. The use of the conjunction 'or' instead of 'and,' is

" in itself persuasive of the intent of Congress in this respect,
" if not conclusive. There is no provision in the Act of 1894
" which by terms, or even by implication, excludes any class
" of merchandise withdrawn for consumption after August 1,
" 1894, from entry at the reduced rates provided for therein"
(Rec., p. 18.)

If anything more had been necessary to show that the words "or withdrawn for consumption," were inserted by Congress *ex industria*, for the express purpose of including, as subject to the duties prescribed by the Act, all merchandise withdrawn, whether imported before or after the Act took effect, and without regard to its previous status, the Board of General Appraisers might have also added a reference to the history of the Bill.

As finally passed, no section or sections corresponding to Section 50 or 54 of the McKinley Act are to be found in the Act, and this fact alone is significant. Congress had for years been enacting laws in which provisions similar to Sections 50 and 54 of the McKinley Act, and 2970 of the Revised Statutes, relating to the duties to be collected on merchandise in warehouse for different periods of time; but in the Wilson Act none of these provisions are to be found, and it is not to be presumed that this omission occurred from carelessness or lack of intention.

When the bill went to the Senate from the House, the words "or withdrawn for consumption," now found in Section 1 of the Act, did not appear in it, but the bill contained a section corresponding to Section 50 of the McKinley Act. (See Congressional Record, May 10, 1894, commencing on page 6431.)

In the Senate amendments were offered to strike out Section 46 of the bill, and to insert in Section 1 the veritable words, "or withdrawn for consumption," here considered. This also cannot be presumed to have been done without intention.

Whatever weight may properly be given by the Court, to the Congressional debates upon these amendments, and to the

expression of the reasons and opinions of individual members concerning them, it is certain that the policy of extending the application of the law to all imported merchandise was thoroughly and forcibly urged, and that after this debate both amendments prevailed. Section 46 was stricken out, and Section 1 was amended to read as it now reads.

Wilson Act.

We are led at this point to ask if Section 1 of the Wilson Act is not to be accepted as describing the conditions to which it relates and as defining the status of the merchandise to which its rate of duty applies, where are we to look for this description and definition? Is it to be asserted that the general saving words of the Wilson Act saved something which had been before saved by the McKinley Act?

We have already seen that such a theory has been literally cut up by the roots, and that to adopt it would defeat the power of the Government to increase or decrease any rate of duty which had once become attached to imported merchandise.

This power has never been denied. It has been exercised in every tariff act in the history government, and we have been unable to find any act in which general saving words of the character now discussed were not made to attend the changes made, and the repealing clauses.

But upon this point we rest upon what we have heretofore said in another part of this Brief.

The intention of the Wilson Act, gathered from its express language and from its history, is made so clear as to admit of no reasonable doubt, that there should not be two rates of duty prevailing upon merchandise which was to enter the markets of the country at the same time; an intention which has uniformly pervaded all tariff legislation, since and before the passage of the warehousing Act of 1846; an intention which has not only been made manifest, as we have seen by the statutes themselves, but derived, declared, and sanctioned

by the Courts. This equality of footing to competition is accomplished by permitting the importer to warehouse his goods, and extending his time for payment of duties, by providing margins as to time in which he may avail himself of existing low rates, by withdrawal of his goods, by providing for refunds, drawbacks, and exportations; by making provisions in warehouse bonds which contemplate changes in rates of duty while goods are in warehouse; and when changes are made in rates of duty, by fixing a day *in futuro* for the effect of the change, to enable business men to adjust their affairs and business and thus prevent mischievous consequences, and other like considerations.

U. S. vs. *Burr*, 15 S. C. 1,004.
Hartranft vs. *Oliver*, 125 U. S., 525.
Merritt vs. *Cameron*, 137 U. S., 542.

All of these matters are more or less directly related to equality of rates of duty to all importers, and upon such equality not only the stability and welfare of the business of the importers depend, but also that of the nation itself.

Under this policy, duties when collected are leveled to meet the conditions and requirements of business as they exist at the time when duties are collected.

While the actual amount involved in the present case is small, the consequences of the decision by this Court as a precedent for the future guidance in the enforcement of the revenue laws are far-reaching; and the questions involved are not to be decided upon narrow or technical views as to the construction of statutes or upon indefinite, uncertain, or forced interpretations put upon the meaning of general words or clauses, but upon the broad and comprehensive principles underlying the law itself.

The fact of withdrawal for consumption of these five tons of rails is accomplished, and cannot be undone. The entry for the withdrawal of merchandise from warehouse is a voluntary proceeding of the importer, and based upon forms prescribed by the Treasury Department more than fifty years

ago, and is essential and technical in the transaction of custom house business as a bill in equity or any other initial proceeding in a Court of law. It would be a breach in the equitable purview of the warehousing laws to attempt to make an entry for withdrawal of merchandise under the Act of 1883, or any other Act which had been repealed.

Upon the fact of withdrawal alone under the Act of 1894, this case may be safely rested.

The stipulation shows that 12 distinct withdrawals were made after the expiration of the three-year period, aggregating 3,606 tons of these importations.

In addition to this, four withdrawals, embracing the remainder of these importations, have been made under protest as to the rate of duty, without any stipulation; a matter of record in the Court below.

During all these transactions no questions were raised as to the right to withdraw; the question was always as to the rate of duty.

The Secretary's letter to the Collector says: "You are "therefore authorized to permit the importers if they shall so "elect to pay the duties upon and to have delivery of a small "portion, say not less than four tons of the above steel rails. "It may be that duties will be so paid under protest in order "that the exaction of duty may be reviewed by the Board of "General Appraisers."

The stipulation, after referring to an offer, by the importers, to make withdrawal entry and pay duties on all the merchandise at the rate of the Wilson Act, contains the following: "This offer has not been accepted by the Treasury Depart- "ment, but authority has been given to make a withdrawal "entry of a portion of the merchandise, at the rate prescribed "by the Tariff Act of 1883, in order that a decision of the "Board of General Appraisers, and of the Court as to the "legal rate of duty chargeable thereon, when withdrawal for "consumption may be obtained." (Rec., p. 14.)

This stipulation was prepared by the Secretary of the Treasury. The purpose of the stipulation is sufficiently shown by the foregoing, but it may be added that the right of the Secretary to authorize a withdrawal could not be tested in this way. These proceedings apply only to tests of rates of duties and of values, under the Administration Act.

The occasion for testing such power of the Secretary would arise only upon his refusal to exercise it, and not upon his exercise of it.

If the owner does not withdraw his merchandise, the Secretary may sell. If he does not exercise it, the merchandise remains in the warehouse subject to duty, just as a pledge is subject to the lien for the security of the payment of the debt for which given. It may or may not be enforced. But if the debt be paid before enforcement of the remedy, the lien is discharged and the property restored to the possession of the owner.

In the present case the goods were not sold. They were withdrawn. The duties were paid. The Board of Appraisers so decided.

A withdrawal entry is the voluntary act of the importer and owner, made in accordance with proceedings prescribed by law and regulations (Sections 2785, 2970, R. S. and *U. S.* vs. *Siedenberg*, 17 Fed., 227).

The sale is the act of the Government, as claimant for duties. One proceeding relieves the Government of its lien and places the merchandise in possession of the owner; the other is a summary act by which the owner is divested of his property by the Government and it is sold to a stranger. One proceeding is a sale of private property for taxes or duties, in which, according to well settled rules, every prerequisite of the Statute having any semblance of benefit or advantage to the owner, must be followed to the precise letter, and strictly complied with.

Thatcher vs. *Powell*, 6 Wheat., 19.

It will thus be seen that after the expiration of three years from the time of original importation, two modes of proceeding were open to the Secretary. One was to advertise and sell the goods, by virtue of the government's matured claim against them for the duties, the other was to postpone the sale and permit the owner to make entry, pay the duties and take them away. Proceedings under the first method would divest the owner of his title to his property and place it in a stranger; a second would continue the title in the owner and place him in possession of the goods. The sale is a summary procedure on the part of the Government, in which the owner has no voice, and of which the mode is minutely prescribed in the statute upon the presumption that the owner had abandoned or waived all his interest in them. The withdrawal entry of the merchandise is the personal and *voluntary* act of the importer himself, in assertion of ownership, in paying the duty and claiming his goods—an entirely different proceeding from that of sale. Both methods are prescribed by law, and each must be strictly followed.

It is a well settled principle of law that when the mode of a proceeding prescribed by the terms of the statute, or by any fair inference from it, no other mode can be substituted as its equivalent. See *Dutihl* vs. *Maxwell*, 2 Blatch. 541.

It must follow, therefore, that the Secretary could not substitute the withdrawal entry of the importer as the equivalent of the sale prescribed by the statute. He chose the former alternative, and in so doing he exercised the large powers conferred upon him by law in reference to the whole subject matter of the bonded warehousing system.

Sec. 2989, R. S., U. S. 15th Op. Atty. Gen., 128.

Since the law gives the Secretary the sole discretion as to when he shall proceed to obtain the duties, it is obvious that no judicial tribunal can question his action. Upon the question of the power and discretion vested in an officer of the Cabinet in determining questions appertaining to his department, the Court, in *U. S.* vs. *Jones*, 18 How. 92, said:

"The Executive Department of the Government, to which "is entrusted the control of the subject-matter, must neces- "sarily determine all questions appertaining to the employ- "ment and payment of such temporary agents, and the "exigency which demands their employment."

"The Secretary of the Navy represents the President and "exercises his power on the subjects confided to his Depart- "ment. He is responsible to the people and the law for "abuse of the powers entrusted to him. His acts and "decisions, on the subjects submitted to his jurisdiction and "control by the Constitution and the laws, do not require the "approval of any officer of another department to make them "valid and conclusive."

This decision has never been modified, except to protect the rights of the importer.

The case of *U. S.* vs. *De Visser*, 10 Fed., 642, which the appellee relies upon, was an action against the surety on a warehouse bond, where a sale of the goods had been postponed without the consent of the surety after the goods had been advertised. The Court held that the surety was not liable, for the reason that the sale was an *essential and inseparable part of the abandonment* proceedings, and was necessary in fixing the duration of the sureties' risk.

The decision supports our contention that there is no abandonment until the sale takes place.

In the Duvivier case also relied on the action was upon a warehouse bond, and the goods had been sold after three years for the non-payment of duties. The question of the applicability of the new rate of duty to goods remaining in warehouse more than three years was held by the Court not to be a material one in that case. The new rate was in terms to apply to goods "withdrawn for consumption." The goods under controversy had been sold, and the suit arose on the warehouse bond. Had they been withdrawn for consumption, the decision might have been different. The case has no perceptible bearing on the present controversy, which involves

the rate and amount of duty imposed after the withdrawal entry had been perfected.

ATTORNEY-GENERAL'S OPINION.

It is proper to allude to the opinion of the Attorney-General under date of January 17, 1895, quoted in argument below and referred to by the Court below as applicable to this case.

It is to be noted—

1. That the opinion related to merchandise to which it was assumed that the Act of 1890 applied, and that, as to the additional ten per centum, Section 2970 was repealed by being superseded by Section 54 of the Tariff Act of 1890.

2. That the Attorney-General then proceeded to deal with two classes of merchandise, the first relating to merchandise not withdrawn for consumption until after the expiration of the three year period.

He refers first to Section 54 of the McKinley Act as superseding 2970 as to three-years merchandise, and making provision for the rates of duty applicable to goods withdrawn within three years. As to this merchandise, he holds that the withdrawal should be at the rates then in force.

Even upon such an assumption, the rates of 1883, on the present merchandise, would have become changed to the rates of the McKinley Act.

But the learned Attorney-General had not yet come to the question as to the effect of the Wilson Act upon merchandise withdrawn after three years. He refers to the provisions of Section 2971 as to abandonment, and to the fact that questions had arisen whether such should be regarded as abandoned and sold and "the proceeds paid into the Treasury," but distinctly asserts "there is no such question, however, "under the Tariff Act of 1894."

His opinion is, therefore, that goods imported and entered for warehouse prior to the Act of 1894, and not withdrawn within three years from date of original importation, are

unaffected by the new rates of duty, and the duties mentioned in Section 2972, R. S., are the duties to which they were previously subject, and the opinion applied not only to goods imported within three years before the Act of 1894 took effect, but to all goods thereafter imported and then subject to the tariff rates of 1890.

The Attorney-General, then, regarded Section 54 of the McKinley Act as a complete substitution of legislation for Section 2970, so as to impose the rates of the McKinley Act on merchandise then in warehouse, even to the extent of removing the additional 10 per centum previously resting upon the merchandise. But as to the Wilson Act, he asserts that no such question can arise, because Section 1 of that Act applies only to merchandise thereafter imported or withdrawn for consumption. It is obvious that the Attorney-General entirely overlooked the significance of the words "or withdrawn for consumption" as they occur in the Wilson Act. These words were just as comprehensive and descriptive of the conditions to which the rates of the Wilson Act applied as were the words of Sections 50 and 54 of the McKinley Act, as to its rates; and if those sections can be deemed to have changed the rates previously existing on merchandise described therein to the extent of removing the additional ten per cent. duty upon it, then the words "or withdrawn for consumption" just as reasonably impose the new rates of the Wilson Act upon merchandise falling within the description of those words. The harmony theory should have been adopted in the one case as well as in the other.

Well defined and adopted meanings must be given to the words of the statute. Merchandise cannot be withdrawn for consumption unless it is imported merchanise.

It need not be withdrawn for consumption immediately upon importation, and if not then withdrawn it is entered for warehousing in bond or for exportation. And the words "or withdrawn for consumption," as they occur in the Wilson Act, mean merchandise which has been imported and which

is immediately taken into possession by the importer, on payment of duties, or has been entered for warehouse.

This is all that was intended by Sections 50 and 54 of the McKinley Act. And as stated before, if those sections were sufficient to change rates of duty, then the Wilson Act itself was sufficient to accomplish the same purpose.

The opinion further shows that the particular facts of this case were not before him at the time of his examination of the laws bearing upon the rates of duty, nor any state of facts analogous thereto fully enough to have enabled him to properly embrace the present case in his expression of opinion. It is assumed that the opinion cannot be regarded as having any other weight than that of a learned advocate of the Government. There is no mention in it of the facts and circumstances connected with this case as set forth in the agreed statement in this record. Had those been given and attention drawn to the long continued practice of the Government of permitting entry of both unclaimed and bonded merchandise after the expiration of the legal limit of time, he would have found it difficult to reconcile the law and practice with some parts of his opinion.

The opinion says there has been a question under previous tariffs as to whether Section 2971, R. S., transfers to the government the ownership of the goods, or whether the goods are to be regarded, after three years, as still warehoused for the benefit of the importer until the government shall sell them; but he left the question where he found it, without any attempt at solution. He then adds that that question is not in issue in the case submitted to him for his opinion, and he then bases his opinion solely on the ground that *because* the merchandise in the case presented to him *had not been withdrawn for consumption* it was not within the scope of the Act of 1894.

In the case before the Attorney-General the merchandise had not been withdrawn for consumption, and so far as known the goods had been abandoned by the owner. In this present

case the merchandise had been entered for withdrawal for consumption and the duties paid, meanwhile remaining in warehouse by express permission, and not abandoned by the owner. It is obvious that the opinion has no relevancy to this particular case, and is not an opinion coming within the scope of the question in controversy.

The Attorney-General disclaims being asked his opinion on the point, whether goods remaining in bonded warehouse more than three years "transfer to the government the own-"ership of the abandoned goods," for he expressly says, "there is no such question * * * under the Tariff Act of "1894." In another place he says, "By the express language "of Section 1 of that Act, the new rates apply, not to all "warehoused goods, as by Section 50 of the Act of 1890, "but only to articles (thereafter) imported from foreign "countries or withdrawn for consumption," inferentially admitting that when they are withdrawn the rate in force under the then existing law would apply.

The opinion seems to hold that bonded goods in warehouse over three years cannot be withdrawn for consumption, but must be sold; while unclaimed goods, not admitted to entry within one year and directed to be sold after that time, may be entered at any time within three years at the then prevailing rates, if not sold, thus making a distinction, in the privilege extended, between one and three years goods, a theoretical exposition of the law not in accordance with its long established practical execution by the officers of the revenue.

But it is not certain what the opinion means as a whole, or in parts; and in view of the theoretical question submitted to the Attorney-General it is not surprising to find, nor disrespectful to him to say, that it is likely to be always a question of purely speculative conjecture as to the true meaning and interpretation of the opinion.

Policy of the Revenue Laws—Equality of Rates.

An important condition attaching to this merchandise, pertinent to the question involved, is the maintenance of uni-

formity in rates of duty levied on the weight at the time of its withdrawal and taking out of bond.

The second proviso of Section 50, McKinley Act, still in force, provides that "duties shall be levied and collected upon "the weight of such merchandise at the time of its with- "drawal." The reason for this is apparent, and is for the protection of the importer, that he shall pay duty on no greater quantity than he actually receives when he pays the duties and gets his goods; hence the duties are determined upon the basis of actual weight at the time when taken from the custody of the Government. This view harmonizes with that of the Board of General Appraisers, and the Secretary of the Treasury, in their efforts to so administer the revenue laws as to make them conform to the spirit of Article I, Section VIII, of the Constitution that "all duties, imposts and excises shall be uniform" throughout the country, and of Section 12, Act of June 10, 1890, that the purpose of creating the Board of U. S. General Appraisers was "to secure lawful and "*uniform* appraisements and classifications at the several "ports."

Steel rails pay duty by weight, 6-10 of one per cent. per pound, under paragraph 117, of the present Act. It may well be asked where is the equality in rates if one importer is compelled to pay $17.80 per ton for his iron and another gets his at $7.80 per ton at the same time?

The protest in this case involves a rate of duty the amount of which is determined by the actual quantity of the merchandise when taken out of bond.

The weight of merchandise often determines the rate which it pays. Take as an illustration an invoice of women's dress goods, which, under paragraph 283, Wilson Act, pays a duty on the value, based on the weight. If the value is not over 50 cents per pound the duty is 40 per cent. ad valorem, if valued at more than 50 cents per pound the duty is 50 per cent. ad valorem. An invoice of such goods weighing 100 lbs. and valued at $50.00 would be entered in bond at the lower rate; and if on withdrawal it weighed one or two

pounds less the rate would be increased to 50 per cent. ad valorem.

It is clear that neither the rate nor the amount of the duty can be ascertained until the merchandise is weighed at the time of withdrawal when the duties thereon are computed and paid. This reasoning suggests an additional thought to that already given as to an "accrued right" of the Government. How can it attach to or affect a rate and amount of duty which cannot be fixed or determined until withdrawn by the importer or otherwise disposed of; since if such a right had the far reaching effect claimed for it by the appellee there could be no changes of rates in a new tariff which contained such a clause as to saving rights.

It is plain that the "accrued right" which the Government has to the duty, whatever it may be, is that given in the schedules and paragraphs of rates in force at the time of withdrawal, and not by the forced construction of saving clauses, nor of a tariff Act long since repealed. Until the goods are sold the *right of the importer* to make entry is as much saved as any other right.

As was said in *Burr* vs. *U. S.*, 66 Fed., 742: "The right " of the Government to exact duties vested at all times and " was being exercised in the making of these laws, and not " that, but individual rights would seem to be intended in " these saving clauses."

The Bonded Warehousing System.

The manifest purpose of the warehousing system is, that whatever goods are in bonded warehouse when a new tariff law goes into operation shall pay only the rates named in that law; that warehoused goods, and goods just arrived, and those to arrive, similar in character, paying at the same time, shall all pay precisely the same rate; that all imported goods should be subjected to the same duty at the same time, to be ascertained by the law in force at the time of their entering into consumption in the markets of the country. The statute

is so framed as to deal with the fact of withdrawal, and not at all with the antecedent status of the goods. If the goods are in warehouse, and as a matter of fact withdrawn for consumption, then the rates prescribed in the Act apply. The statute deals exclusively with the fact of withdrawal, and not with the right of withdrawal. That question was left to the legislature, and cannot be a matter for judicial interpretation, for the Congress has expressed its will very plainly, that if goods are in warehouse, and are withdrawn from such custody by the act of the importer, they shall pay at the rate prescribed by the statute then in force, and this on the grounds of equality, equity and justice. This is the "manifest justice" of the doctrine alluded to by the Supreme Court of the United States in *Hartranft* vs. *Oliver*, 125 U. S. 525. The same doctrine is laid down in *Merritt* vs. *Cameron*, 137 U. S., 542. It is the same principle of uniformity in rates contended for in the Senate debate on the amendment to add the words "or withdrawn for consumption" to the House bill. (See Appendix to this Brief.)

It is the doctrine and point upon which this case turned in the Board of General Appraisers, composed of a body of men selected after much deliberation by the President and Congress, on account of their special training and experience in questions of revenue, to determine rates of duty and fix values in all proceedings in disputed cases. And, finally, it is the pronouncement of a great public policy, which taking note of the fact that some importers bring in their goods in advance of the time of consumption and others do not, declares that both shall have an equal start in the race of competition, and that a highly esteemed source of revenue shall be nourished for the benefit of the Government by assuring those who import merchandise, paying revenue in larger quantities or with more rapidity than others, or who, through business misfortune or inability to pay the duties at the expiration of the credit, shall receive no hurt from any inequality of duty rates when they are placed upon the market.

This assurance has been faithfully redeemed in the Act of 1894.

As the debate shows, high and low tariff men in that Congress, agreed among themselves, that there should not be in force, contemporaneously, one rate of duty for bonded goods and a different rate on goods to arrive; that when an importation should be withdrawn for consumption it should be placed upon an equal footing as to rates as its competitor; and the phraseology of the first section, as it now appears, would accomplish the desired object.

In order to bring about the fact of withdrawal for consumption, it may be said that there must be a concurrence of will and action between the Government and the importer who is to withdraw the goods from the Government custody into his own possession and so place them in the market; whether this mutually arranged and perfected action occurs by reason of a special statutory provision, or by force of an administrative practice already ancient, is of no consequence as respects the fact of entry. In either case the fact is accomplished, the "articles" are withdrawn for consumption and the statute operates to fix the rate of duty.

Upon this point, Mr. Justice Field, in delivering the unanimous opinion of the Court in *Hartranft* vs. *Oliver*, *supra*, said:

"The place where the goods are kept is not the *essential fact*, " but the *custody* of the Government, and the consequent " exclusion of control over them by the owner which calls for " the suspension of *revenue duties.*"

"There is a manifest justice in the rule that goods thus " withheld from the control of the owner or importer shall be "subject only to such duties as are *leviable by the law when he is* " *at the liberty to take possession of them.*"

The same doctrine was previously expressed by Justice Lamar in *Merritt* vs. *Cameron*, 137 U. S., 524. "If the " statute changing the rate of duties goes into effect after the " liquidation of the original entry, a reliquidation must " necessarily take place."

Also by Justice Blatchford in *Hartranft* vs. *Weigmann*, 121 U. S., 609. "We are of opinion that the decision of the "Circuit Court was correct. But if the question were one of "doubt it would be resolved in favor of the importer, as "duties are never imposed on the citizen upon a vague or "doubtful interpretation." *Powers* vs. *Barney*, 5 Blatch, 202 U. S. vs. Isham., 17 Wall., 496.

This position is so manifestedly just that the case might well rest on this point, there being neither mistake nor wilful purpose to evade any legal duty.

In view of the foregoing it is believed to be a violation of all legal and equitable principles of revenue law to collect two different rates of duty upon the same kind of merchandise withdrawn for consumption at the same time, for the reason that one importation was made when the duty was $18.70 per ton, and the other when the law imposed only $7.84 per ton, this being an assumption that two tariffs, with conflicting rates, can be in force at one and the same time.

In *U. S.* vs. *Kent*, 68 Fed., 536, the Circuit Court for the southern district of New York held that the Tariff Acts of 1883 and 1890 were intended to be exhaustive, using the following language in reference to the repeal of Section 7 of the Act of Feb. 8, 1875.

"An examination of the Acts of 1883 and 1890, and con-"sideration of the decisions thereon, have satisfied me "that Congress clearly intended said legislation to be exhaus-"tive and to take the place of all prior legislation."

It is self-evident that whatever may be the power of the Secretary of the Treasury to permit withdrawals after the expiration of three years; whatever right may have accrued to the government to collect duties at given rates upon the present goods; however permanent such rights may have become, it was within the power of the Government, through Congress, to modify, change, or remove them at any time by changing the rate or amount of duty; and if it can be inferred from the reasons and considerations presented to the

Court, or others which have been omitted, that it was the intention of Congress, which legislates in general terms, to include this merchandise in, and make it subject to the changes made by the several acts passed since its importation, then no general words or saving clauses should be permitted to overrule such manifest intention.

The precise points involved in this case have never been decided by any judicial tribunal, although the principles of law applicable have been settled in many cases. This must be our apology for the extended argument. The nearest approach to a parallel case is that of Abbot & Co., in 20 Court of Claims, heretofore fully discussed.

It remains to refer to the facts and to some of the elementary propositions to be kept in mind and applied.

1. It is a question of the rate of duty to be imposed on merchandise remaining in bonded warehouse more than three years, and withdrawn for consumption by permission of the Secretary of the Treasury.

2. The goods became subject to duty at the time of importation, and at the tariff rate provided by the law in force at the time.

3. A bond (*Vide* Appendix) given for duties on warehoused merchandise, in a sum equal to double the estimated duties, and containing a condition for the payment of any increased rate of duty that may thereafter be imposed while the goods remain in warehouse is not a bond for the payment of a fixed sum of money, since the duties may be increased or decreased while the goods are in warehouse, nor for duties at a fixed rate, nor at a fixed time, but the bond continues in force until the duties are paid on the withdrawal of the merchandise, or until the goods are sold.

4. The bonded warehousing system of the country was created for the convenience and benefit of importers, and the government custody of imported merchandise is to secure the payment of duties at the time when the merchandise is taken out.

5. The effect of the so-called abandonment clause of the revenue statutes, even assuming it to be operative, was to place the goods in such relation to the Government that it could obtain the duties by sale whenever it saw proper, and the only right which the Government acquired to the goods at the expiration of three years was the right to sell the goods, but was not a right of ownership.

6. The right and title of the goods remain in the importer until he has permitted their actual sale, which is the essential feature of abandonment of bonded merchandise.

7. In permitting the importer, after the expiration of three years, to make withdrawal entry of this merchandise upon payment of the duties and charges thereon, the Government waived its right of sale, and thereby removed the only disability, if there were any, attaching to these goods, and brought them, as warehoused goods, within the operation of the Tariff Act in force at the time of entry for withdrawal.

8. The postponements of sale, and the authorizations of withdrawal of the merchandise from bond after the expiration of three years were administrative acts of the Secretary of the Treasury, exercised in pursuance of the wide discretion given him in the enforcement of the warehousing Acts, and of the long-continued practice of the Treasury Department.

9. A withdrawal entry of merchandise for consumption cannot be the equivalent of the sale of merchandise provided for under the so-called abandonment provisions of the statute.

10. Under the settled rule of revenue law that an interpretation uniformly followed by the Treasury Department and of long continuance that the sale of goods in warehouse over three years is not made mandatory upon the Secretary will be acquiesced in by the courts.

11. It is a well-settled rule in interpreting revenue laws that the entry of merchandise for consumption carries with it the rate of duty in force at the time it is presented at the Custom House.

12. The Court will take judicial notice of the fact that the Tariff Act of 1883 has been repealed, and that two different tariff rates of duty cannot be exacted upon the same class of merchandise at the same time.

13. A withdrawal entry for consumption cannot be made under a repealed act.

14. The Court will take judicial notice of the fact that it was the purpose of the Wilson Tariff Act of 1894, to reduce the duties on imported merchandise and to make the rates uniform and applicable to all merchandise in bonded warehouse at the time the law took effect (see the decision in this case of the Board of Appraisers.

15. Duties are never to be imposed on the citizen upon a vague or doubtful interpretation.

16. Every ambiguity must be construed, every fair intendment must be made in favor of the importer.

17. It is always a presumption of law that a statute was not intended to work injustice.

18. The spirit and reason of the revenue law requiring equality in rates of duty, any construction not resulting in such equality cannot be a correct interpretation.

It is, therefore, most respectfully maintained, that the Court below erred in deciding 1. "That the merchandise involved in " this controversy became abandoned to the Government within " the meaning of the law and of Section 2971 of the R. S. of U. " S. at the expiration of three years from the date of its original " importation, and at the time of its withdrawal from bond, " as aforesaid, such merchandise was such abandoned goods " and was liable to be sold under the provisions of section " 2971, 2972, U. S. R. S."

2. "That such merchandise upon its withdrawal from bond " aforesaid was subject to the rates of duty in force at the " time of its abandonment, as contained in the tariff act of " March 3, 1883, and section 2960, U. S. R. S., regardless of

"changes in tariff schedules contained in the tariff acts of "October 1, 1890, and August 1, 1894, subsequent to such "abandonment."

3. "That said rails are dutiable upon such withdrawals at "the rate of $17.00 a ton, under paragraph 147 of said tariff "act of March 3, 1883, and such warehouse charges as may "have by law accrued thereon, together with ten per cent. of "such duties and charges additional thereto, under section "2970, U. S. R. S." And in reversing the decision of the Board of U. S. General Appraisers in this case, and other errors set forth in the Record, pp. 59 and 60.

It is, therefore, urged that the decree of the U. S. Circuit Court of Appeals and the decree of the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California in this case should be reversed.

WM. PINKNEY WHYTE,
Counsel for Appellant.

MEMO:—This brief, with certain modifications now made, was prepared by the local Counsel in California, and on account of its exhaustive discussion of the questions, has been adopted and filed by the present counsel for appellant.

APPENDIX—A.

[Extracts from the debate in the U. S. Senate on the amendment to the First Section of the Wilson Bill, to add the words, "or withdrawn for consumption." See Congressional Record, May 10, 1894, page 5431.]

Senator Aldrich said: "The amendment which the Com-
" mittee on Finance proposes, is to have the new rates apply
" to goods withdrawn from warehouse for consumption."

Senator Jones (Ark.) said: "The Bill, with the amendment,
" has been submitted to the Secretary of the Treasury and
" meets his approval."

Senator Allison said: "Whatever goods are in bond when
" the law takes effect, in equity, in my belief, should only pay
" the rate which may be found in the law afterwards."

Senator Harris said: "It seems to me that every considera-
" tion of equality, of justice and equity, demands that at the
" time of payment, the two should pay precisely the same
" rate of duty."

Senator Sherman said: "My own opinion is (and in that I
" agree with some of my colleagues) that the duties can only
" be levied upon imported goods at the time they enter into
" consumption * * * that all goods imported should be
" subject to the same duty imposed by the law at the time of
" withdrawal."

Senator Mills: "They (the importers) pay according to the
" law in force when withdrawn from bond for consumption."

Senator Vest: "He (the importer) pays under the law in
" effect at the time * * * he pays under the existing law
" when they are withdrawn."

Copy of the Condition of Warehouse Bond.

"Now, therefore, the condition of the above obligation is
" such, that if within one year from the date of original
" importation of said goods, wares and merchandise shall be

"regularly and lawfully withdrawn from public store or "bonded warehouse on payment of the duties and charges *to* "*which they shall be then subject;* or if, after the expiration of "*one year*, and within *three years*, from the said date of original "importation, they shall be so withdrawn upon like payment, "with 10 per cent. added upon the amount of such duties "and charges, or if, at any time within three years from the "said date of original importation they shall be so withdrawn "for actual export beyond the limits of the United States, "then the above obligation to be void, otherwise to remain in "full force."

Art. 384, Customs Regs., 1892.

(Copy.)

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY.

WASHINGTON, D. C., June 10, 1895.

Collector of Customs, San Francisco, Cal.:

SIR:—The Department is in receipt of your letter of the 20th instant, in which you state that Messrs. William Wolff & Co., of your port, desire to withdraw from bond ten barrels of American Whiskey, which were imported from Liverpool in May, 1892, and you ask instructions as to the rate applicable thereto upon such withdrawal, the goods having been in bond more than three years.

You are hereby instructed that the whiskey in question is now subject to sale, as abandoned merchandise. Should the importer desire to obtain possession of the same he may be permitted to do so on payment of the internal revenue tax, under the Act of August 28, 1894, and should he desire to contest the validity of such exaction, duty should be paid under protest.

Respectfully yours,

C. S. HAMLIN,
Assistant Secretary.
E. B. JEROME,
Special Deputy Collector.

(Copy of original on file.)

TREASURY DEPARTMENT,
WASHINGTON, D. C., Feb. 27, 1884.

Circular: (Synopsis) 6199.

Within three years during which goods remaining in bonded warehouse may be withdrawn, collectors of customs will notify the parties concerned of the date in which the period limited by law will expire. After such date, and at any time before the goods are listed for sale the Collector may allow a withdrawal entry for consumption, to be made on payment of all charges and expenses, and the duties, regular and additional, which may have accrued. The same measures will be taken, so far as applicable, in the case of unclaimed goods which have not been entered at the Custom House.

H. F. FRENCH,
Assistant Secretary.

To Collectors of Customs.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 34.

THE ANGLO-CALIFORNIAN BANK, Limited, *Appellant*,

vs.

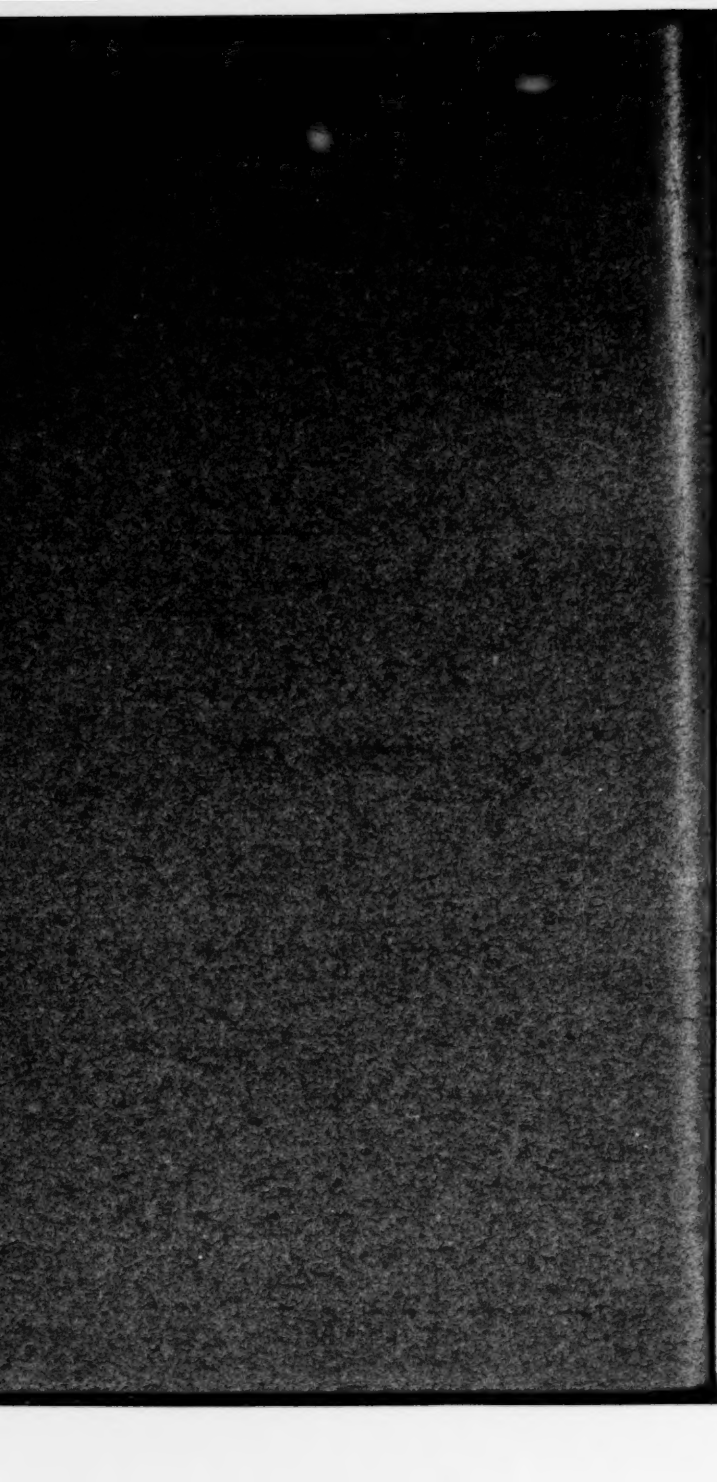
THE SECRETARY OF THE TREASURY, *Appellee*.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of the Petition of the Secretary of the Treasury for Review of a Decision of the Board of the United States General Appraisers, Relative to Certain Tobacco Stem Rolls.

Reply Brief of Appellant as to Jurisdiction Only.

WM. PINKNEY WHYTE,
Counsel for Appellant.



IN THE

Supreme Court of the United States,

OCTOBER TERM, 1899.

No. 31.

THE ANGLO-CALIFORNIAN BANK, LIMITED, *Appellant*,

vs.

THE SECRETARY OF THE TREASURY, *Appellee.*

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of the Petition of the Secretary of the Treasury for Review of a Decision of the Board of the United States General Appraisers, Relative to Certain Twenty Steel Rails.

Argument for Appellant as to Jurisdiction Only.

AS TO THE JURISDICTION.

ARGUMENT.

In submitting the original brief on behalf of the appellant it was not deemed necessary to make any argument as to the jurisdiction of this Court in entertaining this appeal.

The counsel for the appellant was under the impression that the officers of the Treasury Department desired the law settled by the highest authority as to the disposition of goods remaining in warehouse over three years and the proper rate of duty to be charged upon their "withdrawal for consumption;" and the United States Circuit Court of Appeals having expressed the opinion that the question involved was of such importance as to require a review of its decision and decree by this Court, any objection as to the jurisdiction, it was believed, was eliminated from consideration.

However, the brief of the Attorney-General, just filed, imposes on the appellant a brief reply to this objection on the part of the government. The suggestion that the petition should have been filed in the name of the United States is clearly correct in regard to some cases, but the case of Benton vs. Woolsey, 12 Peters, 27, to which reference is made, only prescribes a practice to be followed, unless "it is otherwise ordered by Act of Congress."

U. S. Brief, page 6.

But in the case before the Court the procedure is regulated by Act of Congress, approved June 10, 1890, (26 U. S. St. 131,) act known as "Customs Administrative Act of 1890."

Section 15 of the Act of Congress, approved 10th June, 1890, (26th Stat., page 136,) provides:

"That if the owner, importer, consignee or agent of any imported merchandise, or the collector or *the Secretary of the Treasury* shall be dissatisfied with the decision of the board of general appraisers, as provided for in section 14 of this Act, as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, they or either of them may, within thirty days next after such decision, and not afterwards, apply to the Circuit Court of the United States within the district in which the matter arises for a review of the question of law and fact involved in such

decision. Such application shall be made by filing in the office of the clerk of said Circuit Court a concise statement of the errors of law and fact complained of, and a copy of such statement shall be served on the collector, or on the importer, owner, consignee or agent, as the case may be," etc.

By this Act the Secretary of the Treasury, if dissatisfied, is to set the machinery of the judicial tribunals in motion and is to file a concise statement of the errors of law and fact complained of. The law does not provide that he shall file that statement in the name of the United States, and it is questionable whether it was error on the part of the United States District Attorney in filing the petition in the name of the Secretary of the Treasury. Certainly it did not occur to any one in the lower court to make such objection.

However, it is agreed that the United States shall be substituted for the Secretary of the Treasury as petitioner and appellee.

Upon the Question of Jurisdiction.

It is contended that the case at bar is one governed by the same rules as that of the United States vs. American Bell Telephone Co., 159 U. S. 548-552, because in this case, as in that, the "United States are the plaintiffs or petitioners."

That case decides, that—

"The Supreme Court of the United States has jurisdiction, on appeal from the Circuit Court of Appeals, of a suit by the United States to cancel a patent for an invention; it is not a case 'arising under the patent laws' in which the judgment or decree of the Circuit Court of Appeals is final under the Act of March 3, 1891.

"The operation of a statute claimed to restrict appellate jurisdiction must be restrained within narrower limits than its words import, if the Court is satisfied that the literal meaning of its language would extend to cases which the legislature never intended to include in it."

The inquiry there was whether the appellate jurisdiction of the Supreme Court over controversies, in which the United States are parties, has been circumscribed by Congress in the Judiciary Act of March 3, 1891, (26 Stat. 826,) in respect to the rights of appeal, and this Court held that it had not been. It was contended in that case that the appeal should be dismissed for the reason that the case was one arising under the patent laws, as it is here contended, that this case is one arising under the revenue laws. Cases in which the United States are plaintiffs or petitioners in the Circuit Courts are within the appellate jurisdiction of this Court.

It is the fact that the case in the Circuit Court is a suit in which the United States are plaintiffs or petitioners, which gives this Court appellate jurisdiction in spite of the Judiciary Act of March 3, 1891. As in regard to the patent laws, so in regard to revenue cases, there are many cases arising under the Internal Revenue Acts which go to the Circuit Court of Appeals and some in regard to custom duties which take a like direction, but in suits in the Circuit Courts where the United States are plaintiffs or petitioners, the right of appeal is not restricted in revenue cases as it is not in patent cases.

The right of the United States to an appeal to this Court in cases like the one at bar seems to be admitted; but the government maintains here "that the proper construction of section 6 in respect to appeals in revenue cases is that the judgments or decrees of Circuit Courts of Appeals are final in respect to the *importers* only."

It is impossible to reconcile, with the theory of a popular or republican government, the idea that the United States has a right of appeal under section 6 of the Judiciary Act of March 3, 1891, which, it is contended, is absolutely denied to the importer or the people upon whose goods the duty is levied. The legislative department of the government, it is maintained, never intended any such one-sided protection. "Statutes levying duties on citizens and subjects are to be construed most strictly against the government, and in favor of the citi-

zen or subject," and it is contended that Congress never meant to give to the government broader privileges in regard to the right of appeal in cases where the "United States are plaintiffs or petitioners" than the citizen or subject whose rights are involved in such appeals. It seems hardly possible under our Constitution such a condition of things should exist. But if there is a doubt, that doubt should be resolved in favor of the importer.

Hartranft vs. Wiegman, 121 U. S. 609.

In the brief of the Attorney-General it is said "the appeal allowed from the Circuit Court of Appeals to this Court was improperly allowed, and the importers were not advised to apply here in the proper and regular mode for writ of *certiorari.*" Surely the records of this Court disclose the fact that application for *certiorari* was made to this Court at the October Term, 1896, No. 764, and that the motion was denied on 30th of April, 1897.

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No reasons are given for such denials by this Court; but as the case is one which the Circuit Court of Appeals certifies, as raising questions of "such importance as to require a review of the decision and decree by the Supreme Court of the United States," it is not a violent presumption, that the writ of *certiorari* was refused upon the ground that the right of appeal in suits where the United States are plaintiffs or petitioners still exists, even where the collection of the public revenue is concerned.

WM. PINKNEY WHYTE,
Counsel for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

THE ANGLO-CALIFORNIAN BANK, LIMITED, appellant, v. THE SECRETARY OF THE TREASURY. } No. 31.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

This proceeding began in May, 1895, in the circuit court of the United States for the northern district of California, with a petition of the Secretary of the Treasury for a review under the customs administrative act of a decision of the Board of General Appraisers in the matter of the classification of certain steel (T) rails imported at San Francisco by the Bank of California, those immediately involved on March 2, 1887 (the subsequent liquidation of duties on which was protested by the appellants herein), and others also involved and dependent on the determination herein at different dates from March 2, 1887, to June 24, 1887.

The merchandise remained in warehouse on bond for more than three years, after which partial withdrawals and deliveries were made from time to time by permission of the Treasury Department, and on these withdrawals duties were liquidated under the tariff act of 1890 instead of the act of 1883, in direct violation of the Department's instructions to the collector (Rec., p. 11); and upon the final withdrawal of the 20 rails here immediately involved in March 15, 1895 (leaving, however, over 2,000 tons still in the warehouse), in order to make a test case (p. 12; opinions of both courts below, pp. 27, 50) the collector assessed duty at the rate of $17 per ton under paragraph 147 of the act of March 3, 1883, with 10 per cent additional under section 2970, Revised Statutes, while the importers claimed that section 2970 had been repealed by the customs administrative act and the McKinley act; that duties between October 6, 1890, and August 28, 1894, should have been levied at $13 per ton under paragraph 141 of the McKinley act, and that the 20 rails in question were dutiable at the rate of $7.84 per ton (seven-twentieths of 1 cent per pound) under paragraph 117 of the Wilson act. The paragraphs in question are as follows:

Paragraph 147, act of March 3, 1883:

> Steel railway bars and railway bars made in part of steel, weighing more than twenty-five pounds to the yard, seventeen dollars per ton.

Paragraph 141, act of October 1, 1890:

> Railway bars made of iron or steel, and railway bars made in part of steel, T rails, and punched iron or steel flat rails, six-tenths of one cent per pound.

Paragraph 117, act of August 28, 1894:

> Railway bars made of iron or steel, and railway bars made in part of steel, T rails, and punched iron or steel flat rails, seven-twentieths of one cent per pound.

The facts as affecting the merits, the other statutory provisions involved, and the grounds of protest are shown and represented in detail in the Secretary's petition (pp. 1–4), the protest (pp. 8, 9), the agreed statement of facts (pp. 13–14), the opinion of the general appraisers (pp. 16–18), the findings of fact and law by the circuit court (pp. 19–22), and in the opinions of the circuit court (pp. 24–33) and of the circuit court of appeals (pp. 45–58), the latter of which is for convenience printed in full as an appendix to this brief.

But the question at the threshold is that of jurisdiction, and we contend is the only question properly before this court. The facts concerning it are as follows:

The decision of the circuit court reversed the finding of the Board of General Appraisers, which was in favor of the importers, and held that the rails in controversy became subject to duty under the act of 1883 (that is, at the rate of $17 per ton, with the 10 per cent additional under section 2970, Revised Statutes), and the opinion of the circuit court of appeals affirmed the judgment of the circuit court, with costs. Thereupon the appellants herein, on behalf of the importers, applied to the circuit court of appeals for allowance of appeal to the Supreme Court of the United States, filing the same assignment of errors in effect as were filed in the

appeal from the circuit court to the circuit court of appeals (pp. 34–39). The circuit court of appeals then granted the prayer of the petition and allowed an appeal to this court, stating that it satisfactorily appeared to them "that the question involved is of such importance as to require a review of such decision and decree by the Supreme Court of the United States."

Upon these facts the question presents itself whether there is jurisdiction in this court to entertain the appeal so taken and allowed, notwithstanding the provision of section 6 of the judiciary act of March 3, 1891, which makes the judgments and decrees of the circuit court of appeals final in all revenue cases.

ARGUMENT.

A. As to jurisdiction.

Before entering upon the discussion of the question of jurisdiction it may not be out of place to call attention to a matter of practice. The petition in this case is in the name of the Secretary of the Treasury. It should have been filed in the name of the United States. In such case, as was said by Mr. Justice Gray, delivering the opinion of the circuit court of appeals for the first circuit in *United States* v. *Hopewell* (5 U. S. App., 144, 145), when the proper parties agree, an amendment may be made by substituting the United States as a petitioner instead of remanding the case to the court below. In this suit the United States is the real party in interest, and therefore it should be made a party of record. In *Dugan* v. *United States* (3 Wheat., 172, 180) it was held

that the United States has the right to sue in its own name when it alone is interested in the subject of controversy; and in *The United States* v. *The Bank of the Metropolis* (15 Pet., 390, 401) it was said that in such cases no statute is necessary to authorize the Government to sue, which is no more than to say that the United States is not an exception to the general rule, that all persons who have a just cause of action may sue unless some disability is shown.

The practice in this class of cases has been to make the United States a party to the suit, either as petitioner or defendant—for example, the case of *United States* v. *Burr* (159 U. S., 78). This is evidently the correct practice, because section 15 of the customs administration act expressly says that an appeal shall be allowed "on the part of the United States" whenever the Attorney-General shall apply for it within the thirty days' limit, and that "security for damages and costs shall be given" when the other party appeals, "as in the case of other appeals in which the United States is a party." To give jurisdiction of this appeal, therefore, it would seem to be necessary, or at least proper, to make the United States a party of record here, because, as said by Chief Justice Marshall in *The Governor of Georgia* v. *Madrazo* (1 Pet., 110), "It may, we think, be laid down as a rule which admits of no exception, that in all cases where jurisdiction depends on the party it is the party named in the record."

While insisting that the United States should be made a party of record here, we think the defect may be cured, as in the case of *Benton* v. *Woolsey* (12 Pet., 27). In

that case the bill of information was filed in the name of the district attorney on behalf of the United States, and some doubts were at first entertained by the court as to whether the proceeding should be sustained in that form. Upon this point Chief Justice Taney, delivering the the opinion of the court, said, at page 30:

> But upon carefully examining the bill it appears to be, in substance, a proceeding by the United States, although, in form, it is in the name of the officer. And we find that this form of proceeding, in such cases, has been for a long time used, without objection, in the courts of the United States, held in the State of New York, and was doubtless borrowed from the form used in analogous cases in the courts of the State, where the State itself was the plaintiff in the suit. No objection has been made to it, either in the court below, or in this court, on the part of the defendants, and we think the United States may be considered as the real party, although, in form, it is the information and complaint of the district attorney. But, although we have come to the conclusion that the proceeding is valid and ought to be sustained by the court, it is certainly desirable that the practice should be uniform in the courts of the United States, and that, in all suits where the United States are the real plaintiffs the proceeding should be in their name, unless it is otherwise ordered by act of Congress.

See to like effect *Governor of Georgia* v. *Madrazo*, *supra*.

Coming now to the question of jurisdiction, we shall first consider the provisions of the Customs Administrative Act above cited.

Section 25 repealed the former mode of determining

questions by suits against the collectors of customs in respect to the rates or amounts of duty legally chargeable upon imported merchandise, and sections 14 and 15 of the same act substituted the mode therein described for determining such questions.

By section 14 it is provided that the decision of the Board of General Appraisers shall be final and conclusive as to the rate or amount of duties chargeable upon imported merchandise, unless the persons or officials interested therein shall make application for a review to the circuit court within the time and manner provided for in section 15.

Section 15 provides that:

> If the owner, importer, consignee, or agent of any imported merchandise, or the collector, or the Secretary of the Treasury, shall be dissatisfied with the decision of the Board of General Appraisers, as provided in section 14 of this act, as to the construction of the law and the facts respecting the classification of such merchandise, and the rate of duty imposed thereon under such classification, they or either of them may, within thirty days next after such decision, and not afterwards, apply to the circuit court of the United States within the district in which the matter arises for a review of the questions of law and fact involved in such decision.

It is further provided in this section that—

> The decision of the circuit court shall be final unless that court shall be of the opinion that the question involved is of such importance as to require a review of such decision by the Supreme Court of the United States, in which case the said circuit court, or the judge making the decision, may, within

> thirty days thereafter, allow an appeal to the Supreme Court; but an appeal shall be allowed on the part of the United States whenever the Attorney-General shall apply for it within thirty days after the rendition of such decision.

Assuming for the moment that these sections of the Customs Administrative Act are still in force in respect to appeals direct from the circuit courts to the Supreme Court, it would follow that there is no jurisdiction here, by that act, to entertain the present appeal, because, although the order of the circuit court granting the appeal (Rec., 36) certifies "that the question involved is of such importance as to require a review of such judgment and decision by the circuit court of appeals," it does not comply with the requirements of section 15 by certifying that the question involved is of such importance as to require a review by the Supreme Court of the United States; and besides this, no appeal to the Supreme Court of the United States was asked for in the circuit court by the appellant or allowed by that court.

Unless, therefore, we find jurisdiction for the present appeal in the Judiciary Act of March 3, 1891 (26 Stats. L., 826), it will simply follow that it must be dismissed.

Section 4 of that act provides that:

> * * * The review, by appeal, by writ of error, or otherwise, from the existing circuit courts shall be had only in the Supreme Court of the United States or in the circuit courts of appeals hereby established, according to the provisions of this act regulating the same.

Section 5 specifies the classes of cases in which appeals

or writs of error may be taken from the existing circuit courts direct to the Supreme Court, as follows:

> 1. In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court. * * *
>
> 2. From the final sentences and decrees in prize causes.
>
> 3. In cases of conviction of a capital * * * crime.
>
> 4. In any case that involves the construction or application of the Constitution of the United States.
>
> 5. In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.
>
> 6. In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

The case at bar does not come within the description of any of these classes of cases.

Section 6 of the same act confers appellate jurisdiction upon the circuit courts of appeals "to review by appeal or by writ of error final decision in * * * the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law;" and it makes the judgments or decrees of the circuit courts of appeals final in the following classes of cases:

1. Those "in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States;"

2. In all cases arising under the patent laws;

3. In all cases arising under the revenue laws;
4. In all cases arising under the criminal laws; and
5. In admiralty cases.

This section, however, provides that—

> In every subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision.
>
> And thereupon the Supreme Court may either give its instructions on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

This is a case "arising under the revenue laws," and the said Judiciary Act confers appellate jurisdiction upon the circuit courts of appeals from the final decisions and decrees of the circuit courts "in all cases arising under the revenue laws;" and it makes the judgments and decrees of the circuit court of appeals final in all such cases unless the Supreme Court has required, by certiorari or otherwise, the case to be sent there for its review and determination.

Evidently the case at bar does not come within this exception, because, instead of certifying a question or proposition of law concerning which it desired the instructions of the Supreme Court, the circuit court of appeals

affirmed the judgment of the circuit court and rendered a final judgment to that effect "with costs." (Rec., 58.)

It is true that in the order of the circuit court of appeals (made apparently on the same day that the judgment or decree was rendered) which allowed the present appeal, as prayed for by the appellant, the court say "that the question involved is of such importance as to require a review of such [the] decision and decree by the Supreme Court of the United States." But certainly this expression of opinion does not satisfy the statute; and, besides, no question of law or fact has been certified to the Supreme Court in this cause concerning which the court of appeals desired the instruction of this learned court for its proper decision. It therefore follows that so far as the said judiciary act provides there is no jurisdiction here of the present appeal; and that so far as the Customs Administration Act is concerned there is no jurisdiction of the appeal, because (if the appellate provisions of the act are in force) an appeal was not taken direct to the Supreme Court from the circuit court, as therein provided for.

But as it has, in effect, been decided by this court, in respect to the judgments and decrees made final in the classes of cases enumerated in section 6 of the said act of 1891, that the former mode of review of revenue cases by appeals or writs of error direct to the Supreme Court from the circuit courts has been repealed by that act, we do not contend that an appeal could have been taken in this case *by the appellant* directly to the Supreme Court from the judgment and decree of the circuit court. Whether the United States could take such an appeal in

revenue cases is not a material question in this case. Our position is that, so far as the present appellant is concerned, the final judgment of the circuit court of appeals ended this litigation, and therefore that there is no appeal to this court from that final judgment or decree, and no mode of review except by certiorari.

In *Lau-Ow-Bew* v. *United States* (141 U. S., 583 and 144 U. S., 47) the circuit court rendered a final judgment denying an application for *habeas corpus*. The case was then carried by appeal to the circuit court of appeals, and the judgment was there affirmed. Subsequently a *writ of certiorari* was issued from the Supreme Court to the circuit court of appeals requiring it to certify the case up for review and determination under section 6 of the judiciary act of March 3, 1891. The Supreme Court held in effect in that case that, it being one of a class of cases in which the judgments of the circuit courts of appeals were made final by that section, there was no other mode of review of such final judgments than by writ of certiorari. In such cases, said the Chief Justice, "certiorari would only be issued when questions of gravity and importance are involved, or in the interest of uniformity of decision." (Ib., 144 U. S., 58.)

In *McLish* v. *Roff* (141 U. S., 661), it was held substantially that in cases where the judgments of circuit courts of appeals are made final, the only mode for review in the Supreme Court is upon a writ of certiorari.

In *In re Heath* (144 U. S., 92), it was held that by sections 5 and 6 of the said act there is no appellate jurisdiction in the Supreme Court over the final judgments of the circuit courts of appeals in ordinary criminal cases.

Upon this principle the same may be said in respect to all other classes of classes of cases where judgments of the circuit courts of appeals are made final by section 6.

In *United States* v. *Ranlett & Stone* (172 U. S., 133, 139), which was a revenue case, there appears to have been a *decree* rendered by the circuit court of appeals, from which the United States *appealed* to the Supreme Court; but it is to be observed that that decree certified "certain questions" (id., 139) and that a certiorari was issued and the entire record brought up.

In *United States* v. *American Bell Telephone Co.* (159 U. S., 548, 552) the same rule was stated in respect of "cases arising under the patent laws, under the revenue laws, and under the criminal laws, and in admiralty cases." But when "*the United States are plaintiffs or petitioners*" it would seem that, although section 6 makes the "judgments or decrees of the circuit courts of appeals * * * final in all cases * * * arising under the patent laws, under the revenue laws, under the criminal laws, and in admiralty cases," an appeal may be taken in some patent cases by the United States to the Supreme Court from the judgment or decree of the circuit court of appeals, because it was held in the last-mentioned case that where suits are instituted by the United States in the circuit courts under section 629 of the Revised Statutes to cancel patents granted for inventions, the decrees of the circuit courts of appeals are not final, at least as to the United States, and that the Government has the right of appeal to the Supreme Court of the United States. It is to be observed, however, that the Supreme Court did not regard that case as one strictly "arising under

the patent laws" within the meaning of section 6 of the said judiciary act, but merely as a case of which the circuit court had original jurisdiction under the second and third clauses of section 629, because the United States were "the petitioners;" but as that section also grants original jurisdiction to the circuit court of all suits at law or in equity arising under the patent or copyright laws of the United States, the Supreme Court said in respect to the case before it that "the character in which plaintiffs sue and the nature of the case are inseparably blended." It was no doubt argued that the distinction was a fine one, because in principle the difference between a suit for the granting of a patent for an invention and one afterwards instituted to cancel it is not very apparent when the question of the right of the inventor is in issue. So far as the merits are concerned, where claims to an invention or the validity of a patent are in issue, the question is one arising very largely under the patent laws of the United States, and such suits would therefore seem to arise under those laws as much as proceedings upon a writ of *scire facias* issued upon a recognizance to answer a charge of crime would seem to arise "under the criminal laws."

In *Hunt* v. *United States* (166 U. S., 424) it was held by the court that such a suit was a case arising under the criminal laws within the meaning of section 6 of the act, and therefore the court dismissed the writ of error to the circuit court of appeals for want of jurisdiction.

Perhaps the more apparent reason for sustaining the appeal of the Government in *United States* v. *American*

Bell Telephone Co. is stated in the closing paragraphs of the opinion in that case.

> In instituting this suit the Government appeared on behalf of the public, and, as it were, in the exercise of the beneficent function of superintending authority over the public interests, and the rule of construction in such cases is properly regarded as affected by considerations of public policy. It is upon the principle of public policy that the United States has been held not bound by statutes of limitation, unless Congress has clearly manifested that they should be so bound. * * * And the same rule is applicable to the exercise of the prerogative of *parens patriæ* inherent in the supreme power of every State, in respect of which it was observed by Mr. Justice Strong in *Savings Bank* v. *United States* (19 Wall., 227, 237) that so much of the royal prerogative as belonged to the King in his position as universal trustee enters as much into the principles of our State as it does into the principles of the British Government; * * * and that in this country, where there is no kingly prerogative, but where patents for land and inventions are issued by the authorities of the Government, and by officers appointed for that purpose who may have been imposed upon by fraud or deceit, or may have erred as to their power, or made mistakes in the instrument itself, the appropriate remedy is by proceedings by the United States against the patentee.
>
> We can not impute to Congress the intention of narrowing the appellate jurisdiction of this court in a suit brought by the United States as a sovereign in respect of alleged miscarriage in the exercise of one of its functions as such, deeply concerning the the public interests, and not falling within the reason of the limitations of the act.

Referring now to the present appeal, it might be urged in support of the jurisdiction of this court to entertain the same that because in patent cases, where the United States is petitioner or plaintiff, an appeal lies on behalf of the United States to the Supreme Court from the final decree or judgment of the circuit court or circuit court of appeals, therefore in revenue cases, where, as in this one, the United States is the petitioner, an appeal also lies on behalf of the Government to the Supreme Court from the final decree or judgment of the circuit court of appeals; and, further, that an appeal should also be allowed in behalf of the other party to the suit. But the answer to this is that appeals to the Supreme Court in such cases are to be regarded as the means of protecting and enforcing the prerogative of the Government in respect of its revenues.

The right of the Government to appeal is therefore not to be restricted unless such intention clearly appears in the Judiciary Act or by necessary construction. It is not essential, of course, to the determination of this case, but it may be argued with force, following the grounds laid down in the Bell Telephone Case, *supra*, that the proper construction of section 6 in respect to appeals in revenue cases is that the judgments or decrees of circuit courts of appeals are final in respect to the importers only; nor would this be a harsh distinction, because the statute gives the right of review by this court for the benefit of the taxpayers when difficult or important questions arise in the argument of the cases before the circuit court of appeals renders final judgment or decree, by the certification of questions from that court, and at all

times by the grant of a writ of certiorari out of this court, so that after all is said the distinction here advanced is not so great between the right of the Government and that of the importers. In respect of the former it is in the nature of a prerogative, which is only to be invoked within the sound discretion of the Attorney-General, and in respect of the importer, his right of review in the Supreme Court depends upon the sound discretion of the circuit court of appeals to certify difficult and important questions or propositions of law concerning which it desires the instruction of the Supreme Court, or upon the granting of the appropriate writ by this court. And thus the relief contemplated by the statute against numerous and unnecessary appeals to the Supreme Court is fairly effected in respect to all parties. Besides, it has heretofore been the practice for the Government to proceed regularly by application for *certiorari*, and not to invoke the somewhat doubtful Government right of appeal.

Finally, our contention is that, as the statute says that in revenue cases the judgments or decrees of the circuit courts of appeals are final, therefore the judgment or decree appealed from in this suit is final, and must be so regarded *unless and until*, to adopt the words of section 6, the Supreme Court shall require, by certiorari or otherwise, the case to be certified to it for its review and determination. There was no appeal by the importer from the circuit court to this court, and none was taken in this proceeding. No questions were certified to this court from the circuit court of appeals before final judgment, nor,

for the matter of that, after final judgment. The appeal allowed from the circuit court of appeals to this court was improperly allowed, and the importers were not advised to apply here in the proper and regular mode for writ of certiorari. Hence we contend that the judgment of the circuit court of appeals was final and conclusive, and that the appeal taken to this court should be dismissed for want of jurisdiction.

B. *On the merits.*

We strongly contend that the argument as to the right or propriety of appeal from the circuit court of appeals to this court, and as to the jurisdiction of this court, and as to the failure of the appellants to submit the question of review here regularly and properly by application to the court for a writ of certiorari, fully disposes of the case in favor of the Government, and that this appeal consequently should be dismissed. But if the court deems it advisable to go into the merits of the case, we respectfully submit that the questions have been so fully discussed and the law so clearly stated in the opinions of both courts below, that the Government case may be safely rested thereon without further argument at bar. Consequently, we have printed as an appendix to this brief the opinion of the circuit court of appeals in full.

Nevertheless we state here the Government position in the form of brief propositions:

1. That the merchandise became abandoned to the United States after three years from the original importation and was subject to sale to satisfy the duties then

in force, viz, $17 per ton, under the act of 1883 and 10 per cent additional, with warehouse charges, under section 2970, Revised Statutes, which has not been repealed, the Government rights as to this merchandise being saved by the later acts which are supposed to work a repeal.

2. That the right to sell the merchandise, deducting from the proceeds the duties and charges, was a right accrued to the United States and a liability incurred by the importer within the meaning of section 29 of the customs administrative act, section 55 of the McKinley act, and section 72 of the Wilson act.

3. That section 2971 of the Revised Statutes, granting the Government right of sale after three years, was not repealed or in any wise modified by the said later acts, but has ever been in full force and effect as to this case, except as modified by section 2972, permitting the surplus proceeds of sale to be returned to the owner.

4. That it necessarily follows that the duties and charges to be properly assessed against the rails and collected from the proceeds thereof or from the importer are those in force at the time of the statutory abandonment.

We respectfully submit that the decision and judgment of the circuit court of appeals herein should be affirmed with costs.

HENRY M. HOYT,
Assistant Attorney-General.
FELIX BRANNIGAN,
Assistant Attorney.

APPENDIX.

[Statement by the United States circuit court of appeals.]

The Board of General Appraisers sustained the protest of the Anglo-Californian Bank against the decision of the collector of customs at San Francisco. The circuit court reversed the decision of the appraisers. The material facts upon which the matter in issue was tried are stated in the opinion of the appraisers and of the circuit court to be as follows: "The Bank of California, at various times between March 2 and June 24, 1887, imported into the port of San Francisco certain (T) steel rails, aggregating 5,678 tons. These rails remained in general order unclaimed until February 27, 1888, when warehouse entries thereof were made and bonds given by the Bank of California as importer and consignee. Said warehouse entries were liquidated, under the act of March 3, 1883, at $17 per ton, and at the expiration of one year from the date of the importation the additional duty of 10 per cent prescribed by section 2970, Revised Statutes, was charged upon the bonds against the merchandise. Between September 21, 1888, and December 6, 1889, four withdrawals for consumption were made and the amount of duties charged thereon was paid. When the bonded period of three years was about to expire the Oregon Pacific Railroad Company, for whose account the steel rails in question had been imported, represented to the Treasury Department that serious casualties had occurred to its roads by storms and floods, and requested a

postponement of the sale of merchandise required under section 2971, Revised Statutes; whereupon the Secretary of the Treasury authorized a postponement of the sale for three months without giving due notice to or having the consent of the principal or sureties on the warehouse bonds. Similar postponements have been allowed for periods of six months up to the present date, the Bank of California uniting in two instances in the application for delay. A postponement of the sale of the merchandise allowed by the Secretary of the Treasury September 16, 1893, was conditioned upon the consent of the sureties on the bond. The final postponement was authorized by the Secretary of the Treasury March 25, 1895, pending decision regarding the legal status of the goods by the Board of General Appraisers. Under date of June 30, 1890, more than three years after the date of importation, the Secretary of the Treasury authorized the collector at San Francisco to permit withdrawals for consumption of the steel rails in question from time to time in such quantities as might be desired. On October 21, 1890, the Treasury Department decided that withdrawals might be made under the act of 1890 by the importers at the rates of duty, regular and additional, prescribed by the act of 1883. Notwithstanding this decision 3,306 tons of steel rails were withdrawn for consumption, and in addition to 10 per cent, as prescribed by section 2970, Revised Statutes, duties were paid thereon and accepted by the collector at $13.44 per ton, the rate prescribed therefor in act of October 1, 1890. All charges and expenses, including storage charges, have been paid. The importers recently offered to withdraw for consumption the remainder of the merchandise in bonded warehouse at the rate prescribed in paragraph 117 of the act of August 1, 1894. Permission to make such withdrawals has not been granted by the Secretary of the Treasury, but in lieu thereof authority has been given the collector to permit withdrawal entry to be made by

the importers of a small portion of the merchandise at the rates prescribed in the act of March 3, 1883, in order that a test case for judicial decision might be made. In accordance with the authority thus granted, entry for consumption of twenty of the steel rails in question (weighing about 5 tons) was made by the importers, and duty was assessed thereon by the collector at $17 per ton and 10 per cent additional under the act of March 3, 1883, the act in force at the time the merchandise was imported. Against this action the importers protested, claiming that the merchandise in question, having been withdrawn for consumption after August, 1894, was properly dutiable at seven-twentieths of 1 cent per pound, in accordance with the provisions of section 1 and paragraph 117 of the present act."

Upon these facts the questions presented involve a construction of certain sections of the Revised Statutes of the United States; of the act of June 10, 1890, to simplify the laws in relation to the collection of the revenue (26 Stat., 131, 142), known as the administrative act; of the act of October 1, 1890, to reduce the revenue and equalize duties on imports, and for other purposes (26 Stat., 567, 625), known as the McKinley Act, and of the act of August 28, 1894, to reduce taxation, to provide revenue for the Government, and for other purposes (28 Stat., 509, 570), known as the Wilson Act. The sections of the statutes read as follows:

Revised Statutes.

"SEC. 2970. Any merchandise deposited in bond in any public or private bonded warehouse may be withdrawn for consumption within one year from the date of original importation on payment of the duties and charges to which it may be subject by law at the time of such withdrawal; and after the expiration of one year from the date of original importation, and until the expiration

of three years from such date, any merchandise in bond may be withdrawn for consumption on payment of the duties assessed on the original entry and charges and an additional duty of ten per centum of the amount of such duties and charges."

"SEC. 2971. All merchandise which may be deposited in public store or bonded warehouse may be withdrawn by the owner for exportation to foreign countries, or may be transshipped to any port of the Pacific or Western coast of the United States at any time before the expiration of three years from the date of original importation; such goods on arrival at a Pacific or Western port to be subject to the same rules and regulations as if originally imported there. Any goods remaining in public store or bonded warehouse beyond three years shall be regarded as abandoned to the Government and sold under such regulations as the Secretary of the Treasury may prescribe, and the proceeds paid into the Treasury. In computing this period of three years, if such exportation or transshipment of any merchandise shall, either for the whole or any part of the term of three years, have been prevented by reason of any order of the President, the time during which such exportation or transshipment of such merchandise shall have been so prevented shall be excluded from the computation. Merchandise withdrawn for exportation shall be subject only to the payment of such storage and charges as may be due thereon."

"SEC. 2972. The Secretary of the Treasury, in case of any sale of any merchandise remaining in public store or bonded warehouse beyond three years, may pay to the owner, consignee, or agent of such merchandise the proceeds thereof, after deducting duties, charges, and expenses in conformity with the provision relating to the sale of merchandise remaining in a warehouse for more than one year."

"SEC. 2973. If any merchandise shall remain in public store beyond one year without payment of the duties and charges thereon, except as hereinbefore provided, then such merchandise shall be appraised by the appraisers, if there be any at such port, and sold by the collector at public auction, on due public notice thereof being first given, in the manner and for the time to be prescribed by a general regulation of the Treasury Department. At such public sale distinct printed catalogues descriptive of such merchandise, with the appraised value affixed thereto, shall be distributed among the persons present at such sale. A reasonable opportunity shall be given before such sale, to persons desirous of purchasing, to inspect the quality of such merchandise. The proceeds of such sales, after deducting the usual rate of storage at the port in question, with all other charges and expenses, including duties, shall be paid over to the owner, importer, consignee, or agent, and proper receipts taken for the same."

Administrative act.

"SEC. 20. Any merchandise deposited in any public or private bonded warehouse may be withdrawn for consumption within three years from the date of the original importation, on payment of the duties and charges to which it may be subject by law at the time of such withdrawal: *Provided*, That nothing herein shall affect or impair existing provisions of law in regard to the disposal of perishable or explosive articles."

Section 29, after enumerating several sections of the Revised Statutes (sections 2970, 2971, 2972, and 2973 not being mentioned) and repealing them in direct terms, reads as follows: "And all other acts and parts of acts inconsistent with the provisions of this act, are hereby repealed, but the repeal of existing laws or modifications thereof embraced in this act shall not affect any act done,

or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause before the said repeal or modification; but all rights and liabilities under said laws shall continue and may be enforced in the same manner as if said repeal or modifications had not been made." * * *

McKinley act.

The enacting clause reads as follows: "That on and after the sixth day of October, eighteen hundred and ninety, unless otherwise specially provided for in this act, there shall be levied, collected, and paid upon all articles imported from foreign countries, and mentioned in the schedules herein contained, the rates of duty which are, by the schedules and paragraphs, respectively prescribed, namely:

"Schedule C, paragraph 141. Railway bars, made of iron or steel, and railway bars made in part of steel, T rails, and punched iron or steel flat rails, six-tenths of one cent per pound."

Sections 50, 54, and 55 of this act read as follows:

"SEC. 50. That on and after the day when this act shall go into effect all goods, wares, and merchandise previously imported, for which no entry has been made, and all goods, wares, and merchandise previously entered without payment of duty and under bond for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been issued, shall be subjected to no other duty upon the entry or the withdrawal thereof than if the same were imported respectively after that day: *Provided*, That any imported merchandise deposited in bond in any public or private bonded warehouse having been so deposited prior to the first day of October, eighteen hundred and ninety, may be withdrawn for consumption at any time prior to February first, eighteen hundred and

ninety-one, upon the payment of duties at the rates in force prior to the passage of this act: *Provided further*, That when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse said duties shall be levied and collected upon the weight of such merchandise at the time of its withdrawal."

"SEC. 54. That section twenty of the act entitled 'An act to simplify the laws in relation to the collection of revenues,' approved June tenth, eighteen hundred and ninety, is hereby amended to read as follows: 'Sec. 20. That any merchandise deposited in bond in any public or private bonded warehouse may be withdrawn for consumption within three years from the date of original importation, on payment of the duties and charges to which it may be subject by law at the time of such withdrawal: *Provided*, That nothing herein shall affect or impair existing provisions of law in regard to the disposal of perishable or explosive articles.'"

"SEC. 55. That all laws and parts of laws inconsistent with this act are hereby repealed: *Provided, however*, That the repeal of existing laws, or modifications thereof, embraced in this act shall not affect any act done or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause before the said repeal or modifications, but all rights and liabilities under said laws shall continue and may be enforced in the same manner as if said repeal or modification had not been made."

Wilson Act.

The enacting clause is, "That on and after the first day of August, eighteen hundred and ninety-four, unless otherwise specially provided for in this act, there shall be levied, collected, and paid upon all articles imported

from foreign countries or withdrawn for consumption, and mentioned in the schedules herein contained, the rates of duty which are by the schedules and paragraphs respectively prescribed, namely:

"Schedule C, paragraph 117.—Railway bars, made of iron or steel, and railway bars made in part of steel, T rails, and punched iron or steel flat rails seven-twentieths of one cent per pound." (Which computed upon the basis of 2,240 pounds to the ton would be $7.84 per ton.)

SEC. 72. "All acts and parts of acts inconsistent with the provisions of this act are hereby repealed, but the repeal of existing laws or modifications thereof embraced in this act shall not affect any act done, or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause before the said repeal or modifications; but all rights and liabilities under said laws shall continue and may be enforced in the same manner as if said repeal or modifications had not been made." * * * Section 10 of the act of March 3, 1883 (22 Stat., 525), to which reference will be made, reads as follows:

"That all imported goods, wares, and merchandise which may be in the public stores or bonded warehouses on the day and year when this act shall go into effect, except as otherwise provided in this act, shall be subjected to no other duty upon the entry thereof for consumption than if the same were imported respectively after that day; and all goods, wares, and merchandise remaining in bonded warehouses on the day and year this act shall take effect, and upon which the duties shall have been paid, shall be entitled to a refund of the difference between the amount of duties paid and the amount of duties said goods, wares, and merchandise would be subject to if the same were imported respectively after that date."

[Opinion.]

Before Gilbert and Ross, circuit judges, and Hawley, district judge.

HAWLEY, *District judge:*

The contention of appellant, upon the foregoing state of facts and the various provisions of the statutes relating thereto, is to the effect that when the McKinley Act went into operation the specific rate of duty upon steel rails was changed from $17 per ton to $13.44; that this rate was again changed by the Wilson Act to $7.84; that section 2970 of the Revised Statutes has been repealed and is, therefore, inapplicable to the merchandise in controversy in this proceeding; that the words "shall be regarded as abandoned to the Government," used in section 2971, were repealed by the later sections of the Revised Statutes, and have been so treated by the regulations and practice of the Treasury Department.

The contention of the appellee is that at the expiration of three years from the date of the original importation the merchandise in question became abandoned to the United States and was subject to sale as such to satisfy the duties and charges thereon then in force, to wit, the duty of $17 a ton under paragraph 147 of the tariff act of March 3, 1883, and 10 per cent additional thereon, with warehouse charges, under section 2970 of the Revised Statutes; that this right to sell the merchandise and to deduct from the proceeds thereof the duties and charges as above mentioned was a right accrued at such time to the United States and a liability incurred by said merchandise and the importer thereof, within the meaning of section 29 of the administrative act of June 10, 1890; section 55 of the McKinley Act of October 1, 1890, and section 72 of the Wilson Act of August 28, 1894; that section 2971 of

the Revised Statutes was not repealed nor in any manner modified by the administrative act, nor by the McKinley Act, nor by the Wilson Act, but ever has been since its enactment in full force and effect, save as modified by section 2972, and that it therefore necessarily follows that the duties and charges properly assessed against the steel rails and collected from the proceeds of the sale thereof or from the importer thereof by the collector of customs are those in force at the time of their abandonment.

Which contention is correct?

The questions involved in this case have been argued with marked ability upon both sides. The authorities bearing upon the questions have been collected and discussed at length. The various acts of Congress have been thoroughly reviewed and our attention has been called to the entire system of tariff legislation.

The contention of appellant is sustained by the decision of the Court of Claims in *Abbott* v. *United States* (20 Court of Claims, 280). The contention of appellee is sustained by the views expressed by Attorney-General Brewster (17 Atty. Gen. Op., 650), and Attorney-General Olney, January 17, 1895. Owing to these conflicting opinions, the contest in the present case is presented with the evident purpose of having the questions authoritatively settled.

In the outset it will be conceded that revenue statutes are enacted under the general power of the Government to impose a tax; that in order to sustain the tax in any given case it must affirmatively appear that the power to impose it comes within the letter and spirit of the law authorizing it; that if there are any doubts upon the question the construction should be in favor of the importer. Mr. Justice Story, in *Adams* v. *Bancroft* (3 Sum., 384; 1 Fed. Cases, No. 44, p. 84), said "that laws imposing duties are never construed beyond the natural import of the language, and duties are never

imposed upon the citizens upon doubtful interpretations, for every duty imposes a burden on the public at large, and is construed strictly, and must be made out in a clear and determinate manner from the language of the statute." The same rule has been expressed by the Supreme Court. (*Hartranft* v. *Wiegmann*, 121 U. S., 609, 616, and authorities there cited.) The same learned justice in the earlier case of *United States* v. *Breed* (1 Sum., 159; 24 Fed. Cases, p. 1222) laid down the rule as to the proper construction to be given to such acts as follows: "Revenue and duty acts are not in the sense of the law penal acts, and are not, therefore, to be construed strictly; nor are they, on the other hand, acts in furtherance of private rights and liberty, or remedial, and therefore to be construed with extraordinary liberality. They are to be construed according to the true import and meaning of their terms, and when the legislative intention is ascertained, that, and that only, is to be our guide in interpreting them."

Such laws are more remedial than penal in their nature. They are intended to prevent fraud, to suppress public wrong, and to promote the public good, and should always be so construed as to effectually carry out the purposes and objects which they were intended to accomplish. (*Taylor* v. *United States*, 3 How., 197; *Cliquot's Champagne*, 3 Wall., 115; *United States* v. *Hodson*, 10 Wall., 395; *Smythe* v. *Fiske*, 23 Wall., 374, 380.)

The steel rails in question were imported in 1887 and entered for warehousing February 27, 1888, and the duties liquidated under the act of 1883. At that time the rights and liabilities of the importers were clear and plain. They had the right to withdraw the rails within one year by paying the duties then existing, viz., $17 per ton, or they might, after the expiration of one year and within three years, withdraw the rails upon paying the duty of $17 per ton and 10 per cent additional duty. (Rev. Stat., 2970.)

Upon this point there can be no controversy ; but the rails in question were not withdrawn until after the expiration of the three years, and hence, under the terms of section 2971, were to be "regarded as abandoned to the Government;" but this right of the Government was not enforced because the Oregon Pacific Railroad, for whose account the rails were imported, requested a postponement of the sale for three months on account of serious casualties that had occurred to its railroad. Other postponements were for like reasons made for periods of six months, and in the meantime the tariff acts, designated as the McKinley Act and the Wilson Act, were passed.

Admitting at the threshold of the discussion that the word "abandonment," when first used in the act of August 5, 1861 (12 Stat., p. 294, sec. 5), and repeated in the act of July 14, 1862 (12 Stat., p. 560, sec. 21), during the existence of war, was then used in the broad sense of divesting the importer or owner of any title or interest in the goods, it does not necessarily follow that the same interpretation is to be given to it in the provisions of section 2971. The fact is that by the act of July 28, 1886 (14 Stat., p. 330, sec. 10), the provisions of the act of August 6, 1846, were re-enacted, so that thereafter the law provided that after the sale of the merchandise the excess, after deducting storage, expenses, and duties, etc., should be paid to the owner. The various provisions of the existing laws were thereafter incorporated into the provisions of the Revised Statutes. It therefore follows that the word abandonment, as used in section 2971 in connection with the provisions contained in section 2972, is not to be construed as an absolute abandonment of the goods so as to vest the title thereof in the Government ; but the word is used in the sense of vesting absolute authority and power in the Government when the goods have remained in the warehouse for a period of more than three years to sell and

dispose of the same for the purpose of collecting the duties, charges, and expenses thereon. This, as we shall have occasion hereafter to state, might be accomplished by a regulation of the department allowing the goods to be withdrawn by the owner upon payment of such duties, etc.

Without repeating the respective arguments of counsel in their review of the tariff legislation, the policy of the Government in the collection of revenue duties on imported goods, and the rights of the importers to withdraw from bonded warehouses imported merchandise therein stored, we are of opinion that, after an extended examination thereof, it may safely be said that throughout the entire legislation of this country upon the subject the intent of Congress to limit the right of the importer to withdraw his goods within a certain time and to impose condition for his failure so to do is made manifest. If there were no provisions in the statute for the sale of the goods by the Government, it will readily be seen, as was said by Brown, J., in *United States* v. *Visser* (10 Fed., 642, 649), that "the time for the payment of duties on all warehouse goods would be practically considerably enlarged, since payment of duties could always be safely deferred until the Government was ready to effect a sale. To avoid this practical extension of the period for payment of duties and to secure prompt payment within the time intended to be limited by the warehouse acts, some provision of this kind was necessary. Moreover, the handling of the vast amount of warehoused goods, the orderly collection of the duties upon them through the proper subordinate officers, and the necessity of a transfer of the goods to different hands for the purpose of a Government sale—in other words, the conveniences of the public business—also required that a period be fixed when the importer's right to pay the duties and to control the goods should cease and when the

Government might proceed to sell without inconvenience and without question. The various acts passed since the adoption of the warehouse system show, I think, that the purpose of the statute in question was not only for convenience in the transaction of the public business, but especially, also, to secure the prompt payment of duties within the prescribed period."

The argument of appellant that the action of the Secretary of the Treasury in authorizing the various postponements of the sale of the rails had the effect to nullify the provisions of section 2971 with reference to the abandonment of merchandise remaining in the bonded warehouse beyond the period of three years ought not to be sustained. It is true that under the revenue laws the Secretary of the Treasury, in the collection of the revenues, is invested with much discretion in the exercise of his administrative functions. He has the power to prescribe rules and regulations as to the modes of collection, etc., but he can not, in the exercise of his power, alter or amend the provisions of the revenue laws. "All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted." (*Morrill* v. *Jones*, 106 U. S., 467; *Campbell* v. *United States*, 107 U. S., 407, 410.)

The regulations as made by the Secretary of the Treasury can not, of course, control the courts in the construction of the revenue laws when their meaning is plain, yet if there has been a long acquiescence in such regulations and the rights of parties have been adjusted in accordance therewith the courts ought not to take a different view "without the most cogent and persuasive reasons." (*Brown* v. *United States*, 113 U. S., 571; *United States* v. *Hill*, 120 U. S., 170, 182; *Robertson* v. *Downing*, 127 U. S., 607, 613.)

The action of the Secretary of the Treasury in postponing the sale of the merchandise after the expiration

of three years did not have the effect of giving the importers any new privilege or right or release them from any liability which existed by law.

The regulation of the Treasury Department of February 27, 1884, that "within the three years during which goods remaining in bonded warehouse may be withdrawn collectors of customs will notify the parties concerned of the date on which the period limited by law will expire; after such date and at any time before the goods are listed for sale the collector may allow a withdrawal entry for consumption, to be made on payment of all charges and expenses, and the duties, regular and additional, which may have accrued," is consistent with the provisions of sections ~~2191~~ and ~~2192~~ 2971, 2972 and does not in any manner change or affect the rate of duty and the charges and expenses to which the merchandise had become liable. It is in effect the same as if a sale of the goods had been provided for. Attorney-General Brewster, in reply to the third question of the Secretary of the Treasury, as to "whether, under section 2971, Revised Statutes, goods are to be sold at the expiration of three years from the date of importation, notwithstanding the fact that duties may have been already paid thereon," said: "While I am of opinion that your third question should be answered in the affirmative, and so answer it, I deem it proper to add that I perceive no legal objection to the existing practice of your Department respecting the disposition of goods which have remained in bonded warehouse beyond three years. The objects and requirements of the provisions of section 2971, last above adverted to, are, in my judgment, sufficiently met by that practice, whereby, in lieu of a former sale of goods, the owner, consignee, or agent is permitted to pay the duties, charges, etc., that have accrued thereon and take them away. In case of a sale the owner, consignee, or agent of the merchandise would (under section 2972) become entitled to receive the pro-

ceeds after deducting therefrom the duties, charges, and expenses. The practice referred to accomplishes the same end and is indeed a virtual sale of the goods under the power given the Secretary of the Treasury by the statute."

The act of the Secretary of the Treasury in allowing the withdrawal of the rails in this case is not inconsistent with the provisions of section 2971 with reference to the abandonment of the merchandise. The Secretary, in his letter to the collector of customs allowing the withdrawal, expressly stated that a reference to the decision of the Department for a long series of years shows that it has uniformly held that the duties found due on the warehouse bond at the date of its expiration became a debt collectible from the proceeds of a sale of the goods or from the sureties on the bond, and that subsequent changes of tariff can neither increase nor decrease the amount of such debt. The letter further stated that the Department was not disposed to inflict unnecessary hardship upon the importers by a summary closure of the matter, and, while denying the right of the importers to withdraw the goods unless the duty assessed under the act of March 3, 1883, was paid, permitted them to withdraw a small portion at that rate, and the object of this is stated as follows: "It may be that duties will be so paid under protest in order that the exaction of duty may be reviewed by the Board of General Appraisers. Should this prove to be the case, you are further authorized to delay the sale of the remaining property until a decision has been reached."

Surely the importers can not claim that they were released from any existing liability by reason of this extended favor. The withdrawal of a small portion of the goods was allowed in order to test, not to create, the liability of the importers and the rights of the Government in the premises.

The case of *Abbott & Co.* v. *United States* (20 Court of Claims, 280), decided April 27, 1885, is cited in support

of, and is conceded to be an authority in favor of, the position contended for by appellant. In that case the claimants were, on July 1, 1883, the owners of 66,575 pounds of wool lying in the United States bonded warehouse at Boston. The wool was imported from England, March 8, 1880, and placed in the warehouse, where it remained until August 31, 1883. It was then removed by the claimants. The duties were paid March 7, 1881. The claimants made a demand upon the collector of the port for $665.75, a sum equal to a difference between the duties that had been levied and paid and the duty to which the wool was subject under the tariff act of March 3, 1883, and the court held that the claimants were entitled to the refund. The court, after quoting section 10 of the act of 1883, said: "The language of this section, so far as it relates to goods upon which the duties had been paid, is very general. Taken by itself, it fully sustains the claimants' demand, for their goods were in bonded warehouse when the act went into effect and the duties had been paid. The defendants, however, contend that the claimants can derive no benefit from this section, because their goods, having been in the bonded warehouse for more than three years, were abandoned to the Government under section 2971, Revised Statutes. This section provides that 'any goods remaining in public store or bonded warehouse beyond three years shall be regarded as abandoned to the Government and sold under such regulations as the Secretary of the Treasury may prescribe.' Standing by itself, this section might support the defendants' position. It implies that the title of the original owners, by lapse of time and operation of law, has become divested and the Government has succeeded to the ownership. The original act, July 14, 1862 (12 Stat. L., p. 560), from which this section is taken, was based upon that theory, and so it provided that the proceeds of sale should be paid into the Treasury. The character of this

provision and purpose of the Government have been entirely changed by the act July 28, 1866 (14 Stat. L., p. 330), now section 2972, which provides that 'the Secretary of the Treasury may pay to the owner, consignee, or agent of such merchandise the proceeds thereof after deducting duties, charges, and expenses.' Since this enactment the goods are no longer to be regarded as abandoned by the owner to the Government. The ownership continues without change, but after the sale attaches to the net proceeds instead of the goods. The two sections construed together provide a mode for the collection of duties and charges and the clearance of the warehouses. When the goods have remained in bond more than three years the Government acquires a right to sell them for the purpose named, but can not pocket the proceeds. Hence the practice has arisen in the Treasury Department to allow the owner, at any time before the goods are advertised for sale, to remove the same upon the payment of duties and charges." After quoting with approval the views of Attorney-General Brewster as to the practice of the Department allowing the owner to withdraw the goods upon the payment of duties—further said: "Apparently Congress intended that all goods remaining in the bonded warehouse July 1, 1883, and which, according to the construction and practice of the Department under sections 2971 and 2972, might be withdrawn by the consignee upon payment of duties and charges, should go upon the market with no heavier burdens than were to be imposed, under the new tariff, upon later importations." In so far as this opinion declares that the provisions of section 2971 have been changed by section 2972 so as to allow the importer to remove the goods after they have been in the bonded warehouse beyond the period of three years, "upon the payment of duties and charges," it is not opposed to the views we have expressed. The claimants in the present case were allowed to withdraw the goods in question upon payment of the duties

and charges demanded by the collector. The question is, What amount of duty were the goods subject to?

The court in the Abbott Case seemed to be of opinion that because of the provisions in section 2972 and the practice of the Department in allowing the goods to be withdrawn it was the intention of Congress that the goods "should go upon the market with no heavier burdens than were to be imposed under the new tariff upon later importations." In this respect we decline to accept the conclusions reached by the Court of Claims. The opinion is entitled to and has received respectful consideration, but it is not of controlling authority and ought not to be followed unless its reasoning and conclusion are deemed to be correct.

The case of *In re Schmid* (54 Fed., 145), cited and relied upon by appellant, is different in its facts from the case at bar in this, that the goods in question in that case had not been in bond for a period of three years, and hence did not come within the provisions of section 2971.

Is section 2971 repealed by the subsequent tariff acts?

We have already quoted at length in the statement of facts the various sections and provisions of the laws which are relied upon by appellant to sustain his contention. They need not be again repeated in full. Section 29 of the administrative act repealed in direct terms several sections of the Revised Statutes, but among them section 2971 is not mentioned. It was not in direct terms repealed. The same section of the act also repealed "all other acts and parts of acts inconsistent" with its provisions, with a saving clause that such repeal or modification of the existing laws "shall not affect any act done or any right accruing or accrued, * * * but all rights and liabilities under said laws shall continue and may be enforced in the same manner as if said repeal or modifications had not been made."

Section 55 of the McKinley act of October 1, 1890, and section 72 of the Wilson Act of August 28, 1894, contain the same provisions.

Conceding that section 2970 has been repealed, the question still remains, is section 2971 inconsistent with or repugnant to any of the provisions contained in the acts above mentioned?

It must be conceded that, in order to constitute a repeal of the law upon such grounds, there must be a positive repugnancy between the old laws and the new one. This principal is elementary. In no line of cases has this rule been adhered to with greater strictness than in the interpretation of laws enacted for the collection of the revenues.

In *Wood* v. *United States* (16 Pet., 342, 362) the question was presented to the court whether the sixty-sixth section of the act of 1799 had been repealed or whether it remained in full force. That section of the act, like the one under consideration here, had not been expressly or by direct terms repealed, and the court said: "The question then arises whether the sixty-sixth section of the act of 1799, c. 128, has been repealed or whether it remains in full force. That it has not been expressly or by direct terms repealed is admitted, and the question resolves itself into the more narrow inquiry whether it has been repealed by necessary implication. We say by necessary implication, for it is not sufficient to establish that subsequent laws cover some or even all of the cases provided for by it, for they may be merely affirmative or cumulative or auxiliary; but there must be a positive repugnancy between the provisions of the new law and those of the old, and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy; and it may be added that in the interpretation of all laws for the collection of revenue, whose provisions are often very complicated and numerous to guard against frauds by importers, it would be a strong ground to assert that the main provisions of any such laws sedulously introduced to meet the case of a palpable fraud should be deemed repealed merely because in

subsequent laws other powers and authorities are given to the custom-house officers and other modes of proceeding are allowed to be had by them before the goods have passed from their custody in order to ascertain whether there has been any fraud attempted upon the Government. The more natural, if not the necessary, inference in all such cases is that the legislature intend the new laws to be auxiliary to and in aid of the purposes of the old law, even when some of the cases provided for may equally be within the reach of each. There certainly, under such circumstances, ought to be a manifest and total repugnancy in the provisions to lead to the conclusion that the latter laws abrogated and were designed to abrogate the former." See also *Aldridge* v. *Williams*, 3 How., 1, 25; *The Distilled Spirits*, 11 Wall., 356, 365; *Fabri* v. *Murphy*, 95 U. S., 191, 196.

In *Fabri* v. *Murphy* the question was whether the merchandise was subject to the additional duty of 10 per cent imposed by the act of March 14, 1866 (14 Stat., 8). The goods were imported in November, 1869, and were stored in the bonded warehouse until March 20, 1871, when they were withdrawn for consumption. The court held that the goods were subject to the additional duty of 10 per cent imposed by the act of 1866. In discussing certain acts relating to the revenue the court said: "Acts of Congress of the kind are often very complex in their provisions in order to enable those charged with their execution to protect the Treasury against the constant attempts of importers to evade the payment of new duties or increased taxation. New regulations often become necessary to enable the officers of the custom to defeat such designs, and the rule is that in such cases there ought to be a manifest and irreconcilable repugnancy to warrant the conclusion that the old law is abrogated or that the new law was intended to supersede the antecedent provision."

In the light of these cardinal rules of construction and

of the history, policy, and intention of the revenue laws, as hereinbefore discussed, we are of opinion that the provisions of section 2971 are not inconsistent with the various sections of the subsequent tariff acts hereinbefore referred to.

Attorney-General Brewster, February 7, 1884, in reply to the question of the Secretary whether section 10 of the act of 1883 is necessarily limited to goods which had not been in bonded warehouses more than three years at the date said act went into operation, among other things said: "That the first clause of this section, which deals with imports whereon the duties have not been paid, applies only to such merchandise remaining in the public stores or bonded warehouses on the day the act takes effect as may then lawfully be entered for consumption is indicated by the words 'upon entry thereof for consumption' used therein. These words plainly show that the benefits of the provision were meant for merchandise in bond, which, at the time mentioned, the importer is entitled thus to enter, and for none other. * * * Thus, by the then and still existing law, goods in bond can be entered for consumption and withdrawn at any time during the period of three years from the date of original importation. Upon the expiration of this period, however, the privilege so to enter such goods ceases, and (by section 2971, Revised Statutes) they are to be 'regarded as abandoned to the Government and sold under such regulations as the Secretary of the Treasury may prescribe,' etc. It follows that merchandise whereon the duties have not paid, which had been in the public stores or bonded warehouses more than three years on the day the act of 1883 took effect, does not come within the operation of section 10 of that act. * * * Under section 2977, Revised Statutes, merchandise upon which duties have been paid may thereafter remain in bonded warehouse in custody of the customs officers at the expense and risk of the owners; but the period during which it may thus remain

subject to withdrawal by him is limited, for unless withdrawn for consumption or exportation within three years from the date of original importation it becomes liable to be sold as abandoned to the Government (sec. 2971, Rev. Stat.). * * * I am thus led to the conclusion that the whole of the section is inapplicable to merchandise which on the day the act of 1883 took effect had remained in bonded warehouse more than three years from the date of original importation, and were then, in contemplation of law, abandoned to the Government. In direct answer to your first question I accordingly reply that, in my opinion, section 10 of the tariff act of March 3, 1883, extends only to goods which had not been in bonded warehouse more than three years at the date that act went into operation. * * * The provision in section 2971 * * * has, I think, a double purpose. First, to enforce the collection of duties, charges, etc., upon the goods, and, second, to relieve their customs service from the care and custody thereof. * * * Yet, as already observed, the privilege thereby conferred of letting the goods remain in warehouse in custody of the custom officers after payment of the duties thereon is subject to the limitation of three years from the date of original importation under the operation of the above-mentioned provision in section 2971. At the end of that period they are to be regarded as abandoned to the Government and sold."

If section 2971 is consistent with the provisions of section 10 of the act of 1883, how can it consistently be said that it is repugnant to the section of the McKinley or Wilson acts which we have cited? The preamble in the tariff acts must be read in the light of what is contained in other parts of the laws, especially of the provisions of section 29 of the administrative act, section 55 of the McKinley Act, and section 72 of the Wilson Act, to the effect that the repeal of existing laws or modifications shall not affect any act done "or any right accruing or

accrued," etc. The merchandise in question, having remained in the bonded warehouse for a period of more than three years, on the 24th of June, 1890, became, under the laws then existing and in full force, subject to the duty provided in the tariff act of March 3, 1883, and 10 per cent additional thereon, with warehouse charges as prescribed by law. This was a right that had accrued to the Government prior to the passage of the McKinley or Wilson tariff acts. In *United States* v. *Burr* (159 U. S., 78) the court held that goods arriving at the port of New York August 7, 1894, entered at the custom-house, and duties paid August 8, 1894, and the entry liquidated as entered at the custom-house August 28, 1894, on which day the tariff act of August, 1894, became a law, were subject to duty under the act of October 1, 1890, and not to duty under the act of August 28, 1894. The court, in the course of its opinion, after quoting in full section 72 of the Wilson act and the provisions of section 54 of the McKinley act, said: "This merchandise was entered for consumption and delivered after August 1 and before August 28, 1894, when the act in question became a law. It was subject then to the rates of duty imposed by the law in force at that time, namely, the act of October 1, 1890, and the duties were properly assessed by the collector under that law, unless some provision to the contrary is to be found in the act of August 28, 1894." After quoting the preamble in the first section of the act of 1894, the court continues: "The contention is that, the language of that section being free from all obscurity and ambiguity, there is no room for construction, and that the court is imperatively required to conclude that it was the intention of Congress that the act should have a retrospective operation as of August 1, 1894, although it did not become a law until after that date. It is conceded that the general rule is, as stated in *United States* v. *Heth* (3 Cranch, 398, 413), that 'words in a statute ought not to have a retrospec-

tive application unless they are so clear, strong, and imperative that no other meaning can be annexed to them or unless the intention of the legislature can not be otherwise satisfied,' and that the usual course in tariff legislation has been, inasmuch as some time is necessary to enable importers and business men to act understandingly, to fix a future date at which the statutes are to become operative. The question is not one of construction, but of intention as to the operative effect of this act because of the existence of the particular date in section 1. In view of the general rule and the admitted policy in respect of such laws, is there anything on the face of the act which raises such a doubt in the matter as justifies the court in considering whether the language used in that particular section must be literally applied in the case before it? And upon the threshold we are met with the fact that the act of October 1, 1890, was not repealed in terms until August 28, 1894, and that the repealing section of the latter act kept in force every right and liability of the Government or of any person which had been incurred or accrued prior to the passage thereof, and thereby every such right or liability was excepted out of the effect sought to be given to the first section. The right of the Government to duties under the tariff law which existed between August 1 and August 28 was a right accruing prior to the passage of the act of 1894 (that is, the date when the bill became a law), and the obligation of the importers between August 1 and August 28 to pay the duties on their entries under existing tariff law was a liability under that law arising prior to the passage of the act of 1894, and if Congress intended that section 1 should relate back to August 1, still the intention is quite as apparent that the act of October, 1890, should remain in full force and effect until the passage of the new act on August 28, and that all acts done, rights accrued, and liabilities incurred under the earlier act prior to the repeal should be saved from the effect there-

of, as to all parties interested, the United States included. The duties under consideration were paid August 8, and the merchandise delivered on August 11, but it was not until August 28 that the fact was stamped on the entry that the goods were liquidated as entered. There was no change in the classification and no additional duty was demanded or collected, and the payment made at the time of entering the merchandise for consumption was the payment of duties. (*Barney* v. *Rickard*, 157 U. S., 352.) The original assessment of duty was right, and the final liquidation was the same, and there was no specific provision in the act of 1894 requiring a liquidation at the rates under that act. How, then, can it be held that the act of October 1, 1890, was intended to be repealed by retroaction? Moreover, in arriving at the true intention of Congress we can not treat section 1 as if it constituted the entire act, but must deduce the intention from a view of the whole statute and from the material parts of it. * * * Again, a higher rate of duty was imposed on many articles by the act of 1894 than under the prior act, and a lower rate of duty on others, while some that were free were made dutiable, as, for instance, the article of sugar. Must duties paid between August 1 and August 28 be refunded where the rate was lowered and assessed where the rate was raised or a duty imposed where none existed? Clearly not. These considerations lead to the conclusion that the act ought not to be construed to operate retrospectively contrary to the general rule, and so as to turn what was intended to secure a period of time to enable business men to act understandingly under the new law into a source of confusion and mischief to the contrary. * * * And as the act of October 1, 1890, was not repealed by the act of August, 1894, until the latter act became a law, when inconsistent laws were declared thereby repealed, we think it can not be doubted that Congress intended the rates of duty prescribed by the act of 1894 to be levied on the 1st day of August if the bill should then

be a law, and if not, then as soon after that date as it should become a law. On the 1st day of August the duties prescribed by the first section of the act of 1894 could not be lawfully levied, and so far as the importations in this case are concerned and others similarly situated the law required the exaction of the duties prescribed by the act of 1890. As to such importations the first section of the act of 1894 could not be literally carried out, unless by holding it to operate as a retroactive repeal, notwithstanding the saving clause, and this we consider altogether inadmissible. The language of section 1 was that on and after the 1st of August there shall be levied, and of the second section that on and after the 1st day of August certain enumerated articles when imported shall be exempt from duty. In our judgment, the word 'shall' spoke for the future and was not intended to apply to transactions completed when the act became a law."

Appellant relies upon the words "or withdrawn for consumption," as found in the preamble of the Wilson Act, to sustain the position that the rate of duties therein prescribed apply not only to merchandise thereafter imported from foreign countries, but also to merchandise that had remained in the bonded warehouse for a period of more than three years which should thereafter be "withdrawn for consumption." It may be admitted that such a construction could and should be given to the language of the preamble, if its interpretation was to be drawn from that section alone. But it is the duty of the court to examine the entire act, or at least the provisions which have any special bearing upon the question, and also to examine the provisions of other acts which are to be construed in *pari materia* therewith. The entire revenue laws in force must not be overlooked. All acts not repealed must be taken into consideration and harmonized, if possible, so as to make a consistent whole. To give to the section in question the construction which appellant claims for it would, as we have already shown, be incon-

sistent with the history and general policy of the tariff legislation of this country and repugnant to various provisions of the existing revenue laws. To construe the words "withdrawn for consumption" as intended to apply to the provisions of the previous revenue acts allowing goods to be "withdrawn for consumption" within three years makes it consistent, and such, we believe, was the intention of Congress.

Attorney-General Olney, in a letter dated January 17, 1895, to the Secretary of the Treasury, with reference to rates of duty chargeable on certain goods which were originally imported while the provisions of the McKinley tariff act of 1890 were still in force, but remained in the custody of the Government until after the passage of the Wilson tariff act of 1894, expressed views which we believe to be correct and directly applicable here. He said that by the express language of section 1 of the act of 1894 "the new rates apply not to all warehoused goods, as by section 50 of the act of 1890, but only to 'articles (thereafter) imported from foreign countries or withdrawn for consumption.' The latter clause should be construed with the prior legislation above quoted so as to constitute a harmonious whole. In my opinion, therefore, goods imported and entered for warehouse prior to the act of 1894, and not withdrawn for consumption within three years from the date of original importation, are unaffected by the new rates of duty; and the 'duties' mentioned in section 2872 of the Revised Statutes are the duties to which they were previously subject, whatever be the construction to be put upon this section in other respects. My opinion applies not only to goods imported within three years before the act of 1894 took effect, but to all goods theretofore imported and then subject to the tariff rates of 1890."

For the reasons herein given we are of opinion that the contention of the appellee is correct.

The judgment of the circuit court is affirmed with costs.

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In the Supreme Court of the United States.

OCTOBER TERM, 1899.

THE ANGLO-CALIFORNIAN BANK, Limited, appellant, v. THE SECRETARY OF THE TREASURY. } No. 31.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

SUPPLEMENTAL BRIEF FOR THE APPELLEE AND THE UNITED STATES.

The reply brief of appellant calls attention (p. 5) to an inadvertent error in the Government brief by reason of the statements on page 18 of the latter that the importers were not advised to apply to the court for certiorari and had failed to do so. The application was, however, duly made and denied by the court on April 30, 1897. (166 U. S., 722.)

This, however, makes the Government's contentions so much the stronger, both on the question of jurisdiction

and as to the merits; for, as to jurisdiction, the court has declined to take the case without intimating that there was any right of appeal, and this must be regarded under the court's previous decisions as conclusive of the jurisdictional question; and, as to the merits, this result, that is, the denial of the application for certiorari, must fairly be presumed to have been reached after a review of the merits by the court. Without intimating to any degree that the presentation now of this appeal shows a lack of conformity on the appellant's part to the conclusive determination of this case by the court, it is certainly in effect an attempt to obtain another review, and if possible a different determination, in an irregular manner, which, we confidently submit, should not be approved.

As the court's denials of motions for certiorari state no reasons, the appellant contends in effect that the denial herein is consistent with and was ordered in view of an underlying right of appeal; but, as we state, this action of the court, affecting substantially both the jurisdiction and the merits, is conclusive and final. The matter is *res adjudicata;* the decision here and in both courts below is adverse to the appellant, and he may not now be heard.

In the argument based upon the case of the *United States* v. *The American Bell Telephone Co.* (159 U. S., 548, 552), viz: that because in certain patent cases in which the United States is a petitioner the United States has a right of appeal under the statutes involved, notwithstanding the circuit court of appeals act, therefore

in revenue cases it should have the same right, the conclusion does not follow from the premise; and besides, the right might exist in the United States because of the considerations of sovereignty and the functions of the Government as *parens patriæ* and trustee for all the people, in respect to the revenue as well as in respect to patents for inventions, a fundamental reason which is applied to the latter case in the American Bell Telephone Company decision; and yet the equivalent right might not exist in the other party, in this case, in the importers. The rights of the contestants against the Government, whatever the case, are sufficiently safeguarded, because they may always bring their case before this court by an application for certiorari, just as the importers did here, and the opportunity to convince the lower court that the questions are of such importance as to demand certification thereof is also always open. Finally, on these points we reiterate the statement of the main brief, that in revenue cases the Government, like the importers, has sought review here by application for writ of certiorari.

We respectfully submit again that the decision and judgment of the circuit court of appeals should be affirmed, with costs.

HENRY M. HOYT,
Assistant Attorney-General.

ANGLO-CALIFORNIAN BANK *v.* UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 81. Submitted October 11, 1899. — Decided October 30, 1899.

This court has no jurisdiction to review, on appeal, a judgment of a Circuit Court of Appeals, affirming a decree of the Circuit Court below which overrules the decision of a Board of General Appraisers in a port of entry, appointed under the act of June 10, 1890, c. 407, and which sustains as valid, duties levied and collected by the collector of the port into which the goods were imported.

The United States was properly made a party defendant in this suit, in this court, in the place of the Secretary of the Treasury.

THE case is stated in the opinion.

Mr. William Pinkney Whyte for appellant.

Mr. Assistant Attorney General Hoyt for the United States. *Mr. Felix Brannigan* was on his brief.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

This was a petition filed in the Circuit Court of the United States for the Northern District of California by the Secretary of the Treasury, under the act of June 10, 1890, c. 407, 26 Stat. 131, commonly known as the customs administrative act, for the review of a decision of the Board of General Appraisers in the matter of the classification of certain steel T rails imported at San Francisco by the Bank of California and withdrawn on its authority by the Anglo-Californian Bank, Limited. The duties levied by the collector were paid under protest, and the protest sustained by the Board of General Appraisers. The Circuit Court reversed the decision of the Board, 71 Fed. Rep. 505, and the Anglo-Californian Bank carried the case by appeal to the Circuit Court of Appeals for the Ninth Circuit, which affirmed the decree of the Circuit Court. 48 U. S. App. 27. After an unsuccessful application

to this court for a writ of certiorari, 166 U. S. 722, the Bank prayed the pending appeal, and the cause, coming on for argument, was submitted on printed briefs.

The proceedings were carried on below in the name of the Secretary of the Treasury, but in this court, by agreement, the United States were properly substituted as a party. *United States* v. *Jahn*, 155 U. S. 109; *United States* v. *Hopewell*, 5 U. S. App. 137.

The judiciary act of March 3, 1891, 26 Stat. 826, c. 517, provides for the review of the final decisions of the Circuit Courts by this court and by the Circuit Courts of Appeals. Section five specifies the classes of cases which may be brought directly to this court, and section six confers appellate jurisdiction in all other cases on the Circuit Courts of Appeals, whose judgments or decrees in certain enumerated classes of cases are made final by the statute. At the same time the section provides that the Circuit Courts of Appeals may certify to this court any questions or propositions of law concerning which instruction is desired for the proper decision of pending cases, and that these may be answered or the whole cause required to be sent up for consideration. And it is also provided that those cases in which the judgments or decrees of the Circuit Courts of Appeals are made final may be required by this court, by certiorari or otherwise, to be certified to it for review and determination.

This is not an appeal from the Circuit Court directly to this court, nor does the case fall within either of the classes of cases enumerated in section five, in which such an appeal would lie.

No question or proposition of law concerning which the Circuit Court of Appeals desired the advice of this court was certified, and, on the contrary, the decree of the Circuit Court was affirmed by the judgment of the Circuit Court of Appeals with costs.

The case is not before us on certiorari, but on appeal, and an appeal does not lie in those cases in which the judgments or decrees of the Circuit Court of Appeals are made final by the statute. Among those cases are cases "arising under the

revenue laws," and as this is such a case, the appeal cannot be maintained.

It is true that under the act of June 10, 1890, an appeal would lie directly from the Circuit Courts to this court if the Circuit Court should be of opinion that the question involved was of such importance as to require a review of its decision by this court, and that in the order allowing this appeal the Circuit Court of Appeals stated "that the question involved is of such importance as to require a review of said decision and decree by the Supreme Court of the United States;" but this is not an appeal from the Circuit Court, and, moreover, the judiciary act of March 3, 1891, prescribes a different rule as to the prosecution of appeals.

In *United States* v. *American Bell Telephone Company*, 159 U. S. 548, it was held that this court had jurisdiction by appeal over a decree of a Circuit Court of Appeals in a suit brought by the United States in the Circuit Court to cancel a patent for an invention.

The argument was pressed that the appeal could not be maintained because the decrees of the Circuit Courts of Appeals were made final by the act in cases "arising under the patent laws," and that that was such a case. In view of the fact, however, that the United States instituted the suit as a sovereign in respect of alleged miscarriage in the exercise of one of its functions as such, it was thought that considerations of public policy forbade imputing to Congress the intention to include the case in that category.

We observed that actions at law for infringement, and suits in equity for infringement, for interference, and to obtain patents, being brought for the vindication of rights created by the patent laws, were clearly cases arising under those laws, and came strictly within the avowed purpose of the act of March 3, 1891, to relieve this court of that burden of litigation which operated to impede the disposition of cases of peculiar gravity and general importance. But there was nothing in the objects sought to be attained and the mischiefs sought to be remedied by the act which furnished foundation for the belief that Congress intended to place a limitation on our appel-

late jurisdiction in a suit in which the United States were plaintiffs and appellants, and which was brought in effectuation of the superintending authority of the Government over the public interests.

We do not think the present appeal comes within the ruling in that case.

Appeal dismissed.